BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 15 of 2013

BETWEEN:

APSARA RESTAURANTS (BARBADOS) LIMITED **Appellant**

AND

GUARDIAN GENERAL INSURANCE LIMITED **Respondent**

Before: The Hon. Sir Marston C.D. Gibson, KA, Chief Justice, The Hon. Sandra P. Mason and The Hon. Kaye C. Goodridge, Justices of Appeal.

2015: June 4, July 3
2016: May 18

Mr. Alair P. Shepherd QC for the Appellant.
Mr. C. Anthony Audain and Mr. Brian Barrow for the Respondent.

DECISION

GOODRIDGE JA

Introduction

[1] This is an application by the respondent for an order for security for costs in an appeal.

Background

[2] During the month of August 2006, the appellant, a limited liability company incorporated under the **Companies Act, Cap. 308** (**Cap. 308),** opened two restaurants known as "Apsara" and "Tamnak Thai" in rented premises at Morecambe House, Worthing in the parish of Christ Church.

[3] On 5 April 2007, the appellant effected a policy of insurance with the respondent, a limited liability company incorporated under the laws of Trinidad and Tobago, registered as an external company under **Cap. 308** and which conducts the business of insurance underwriting in Barbados. Under that policy, the respondent agreed to insure the appellant against loss or damage by fire at the appellant's place of business.

[4] Sometime in the early hours of the morning of 27 August 2007, a fire occurred at the restaurants which destroyed the leasehold improvements, furniture, effects and other equipment and stock in trade. The appellant made a claim for loss under the policy which the respondent refused to honour.

[5] On 6 March 2008, the appellant filed a claim against the respondent seeking to recover the sum of $6,092,696.60 in relation to the losses

which resulted from the fire. The matter was heard by **Crane-Scott J**, who dismissed the claim on 25 October 2013 with reasons to be provided at a later date.

[6] The appellant filed a notice of appeal against that decision on 11 November 2013.

[7] The judge gave her reasons in a written decision on 31 December 2014, and awarded the respondent costs certified fit for two attorneys-at-law, to be assessed if not agreed.

The Application

[8] On 6 May 2015, the respondent filed an application for security for costs. That application was supported by the affidavit of Nigel Adams, Executive Manager of the respondent.

[9] When the matter came on for hearing on 4 June 2015, the respondent sought and obtained leave to file an amended application.

[10] In the amended application filed on 8 June 2015, the respondent sought an order that:

> "1. Pursuant to rule 62.17 of the Supreme Court (Civil Procedure) Rules, (the CPR) that the Appellant pay into Court the sum of $117,975.65 together with Value Added Tax thereon of $20,645.74 (or provide a bond from an acceptable commercial bank in Barbados in favour of the Respondent to cover such security) as security for the costs of the Respondent in these proceedings.

> 2. Pursuant to rule 65.7(1)(a) to (d) of the CPR that the Appellant pay to the Respondent the sum of $88,612.06 in respect of its expert costs.
>
> 3. The Appellant pay to the Respondent agreed costs in the amount of $176,963.48 together with Value Added Tax thereon of $30,968.61 as ordered by the High Court in the proceedings below.
>
> 4. Pursuant to Rule 24.5 of the CPR that unless the Appellant pay into Court (or provide a bond from an acceptable commercial bank in Barbados in favour of the Respondent to cover such security) the security for the costs of the Respondent in these proceedings sought in paragraph 1 above within 14 days of the date of such Order, that these proceedings be stayed until such time as security for costs is provided.
>
> 5. Unless the Appellant pays to the Respondent the agreed costs as ordered by the High Court in the proceedings below together with its experts' costs, that these proceedings be stayed until such time as the Appellant pays such costs."

[11] According to Mr. Adams' affidavit, the appellant has agreed the costs as ordered by **Crane-Scott J** but has failed and/or refused to pay those costs. A request for payment was made to counsel for the appellant by letter of 13 March 2015. The costs remain unpaid. Mr. Adams also deposed that, according to advice received and his belief, the appellant's appeal does not have a substantial likelihood of success.

[12] At the hearing, counsel for the parties made oral submissions to the Court. The parties then requested and were granted leave to file

written submissions relating to the issue of contempt and the matter was adjourned to 3 July 2015. Those submissions were duly filed by both counsel.

The Issue

[13] The issue which arises for the Court's determination is whether the Court should order the appellant to provide security for the respondent's costs of the appeal; and if such order is made, whether that order should extend to the costs which were awarded by the High Court (inclusive of expert costs).

Security for Costs of the Appeal

[14] At the outset, Mr. Shepherd, QC, counsel for the appellant, conceded that the respondent is entitled to security for costs of the appeal. Counsel indicated that the costs awarded in the High Court have been agreed in the sum of $176,000.00 plus VAT and he was prepared to accept a total figure of $180,000.00. Mr. Shepherd QC informed the Court that his client wished to produce a bond, and identified the bank as the Republic Bank.

[15] In response, Mr. Audain, counsel for the respondent, informed the Court that the precise figure agreed for costs below is $176,963.48 plus VAT giving a total of $207,932.89. If the appeal is dismissed

and the respondent is awarded costs, that figure could not be more than two-thirds of the amount below, according to **rule 65.15** of the **Supreme Court (Civil Procedure) Rules, 2008**. Therefore two-thirds of the costs exclusive of VAT is $117,975.65.

Discussion

[16] The appellant was unsuccessful in the court below and has now exercised its right to appeal against the decision of **Crane-Scott J**.

[17] **Section 61(1)(h)** of the **Supreme Court of Judicature Act, Cap. 117A (Cap. 117A)** provides that for all the purposes of and incidental to the hearing or determination of an appeal, this Court may, in special circumstances, order that such security be given for the costs of an appeal as appears just.

[18] **Rule 62.17** sets out the principles to be applied by this Court when it is considering an application for security for costs.

[19] Mr. Shepherd QC has conceded that this Court ought to exercise its discretion in favour of the respondent and order security. In all the circumstances, this Court, in the exercise of its discretion under **section 61(1)(h)** and **rule 62.17** considers that it is just to make the order for security for the costs of the appeal.

Security for Costs of the High Court Proceedings

[20] Mr. Audain submitted that the evidence in the court below as to financial difficulties being experienced by the appellant has raised doubts about the appellant's ability to meet any costs that may be awarded against it.

[21] He referred to the fact that the appellant has failed to satisfy the costs ordered by the High Court. This failure, he submitted, amounted to contempt which must be purged before the appeal can be heard. He cited **Dino Trading and Services Pte Ltd et al v Steven Steel Supply Civil Appeal No 3 of 2000 (Dino Trading)**; **Midland Bank Trust Co Ltd v Green [1979] 2 All ER 193 (Midland); Hadkinson v Hadkinson [1952] 2 All ER 567** (**Hadkinson)** and **Isaacs v Robertson (1984) 43 WIR 125**.

[22] Mr. Audain submitted that the general rule is that a party in contempt cannot be heard or take part in proceedings in the same cause until he has purged his contempt; nor while he is in contempt can he be heard to appeal from any order made in the cause. This rule is, however, subject to exceptions.

[23] Counsel also submitted that, even in cases where the rule is prima facie applicable, a court appears to retain a discretion whether or not

to hear the party in contempt, and may in its discretion refuse to hear a party only on those occasions when the contempt impedes the course of justice and there is no other effective way of enforcing his obedience.

[24] Mr. Audain submitted further, that while the Court is expressly permitted to make an order for security for costs in an appeal under **section 61(1)(h)** of **Cap. 117A**, a reading of **section 61(g)** and **(i)** leads to the view that the Court could make any order as it relates to the payment of costs relative to proceedings in the original court. He was therefore satisfied that this Court was not constrained from staying the appeal until such time as the appellant has complied with the order of the High Court.

[25] Mr. Shepherd QC countered Mr. Audain's submissions by submitting that:

> (i) the appellant is not strictly in contempt as the disobedience is not an order for payment;
>
> (ii) the appellant is not seeking to make an application but to appeal;
>
> (iii) the respondent has open to it the process of execution and therefore the stay is not the only method of ensuring compliance and is not necessary to ensure that justice is achieved.

[26] He acknowledged that the principle on which the respondent relies is that stated by Romer LJ in **Hadkinson**. However Mr. Shepherd QC noted that Denning LJ stated that principle in more qualified terms and his approach was preferred by Oliver J in **Midland**.

[27] It was Mr. Shepherd QC's further submission that none of the authorities cited by Mr. Audain addresses a situation where a litigant is exercising a right of appeal.

[28] In conclusion, Mr. Shepherd QC submitted that the cases cited by Mr. Audain involved applicants who were seeking to re-launch the same application and were not relevant to the present circumstances which concerned a litigant who was appealing as of right.

Discussion

[29] **Section 61(g**) and **(i)** of **Cap. 117A** empowers this Court to:

> "(g) make such order as to costs and expenses incurred in the appeal and in the proceedings in the original court as the Court of Appeal thinks fit;
>
> (i) make such other order as is necessary for the due determination of the appeal."

[30] On a plain reading of **section 61(g)**, it is clear that the power given to the Court under this section is to be exercised on completion of the hearing of the appeal.

[31] The main plank of Mr. Audain's argument is that the appellant's failure to pay the costs ordered by the High Court is contempt which must be purged before the appellant can proceed with its appeal.

[32] As was stated earlier, the appellant's claim was dismissed in the court below and it was ordered to pay the respondent's costs. These costs are still outstanding. The appellant has therefore failed to comply with the order of the court which is a form of contempt.

[33] The manner in which the courts have approached the issue of contempt can be seen from an examination of the relevant authorities. The general rule is that a party in contempt cannot be heard until he has purged his contempt. In **Hadkinson**, the principle was expressed by Romer LJ in the following terms at **p 569**:

> "It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham LC said in Chuck v Cremer (1 Coop temp Cott 342): "A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it .... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid - whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and

> who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed".”

[34] There are two consequences which follow when there is a breach of this obligation. As Romer LJ stated:

> "The first is that anyone who disobeys an order of the court...is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to the court by such a person will be entertained until he has purged himself of his contempt.”

[35] Denning LJ however, took a less rigid approach to the issue. At **page 574**, he expressed the view that, no matter how badly a litigant has behaved, generally speaking, if he has a right of appeal, he has a right to be heard, for the simple reason that, if he is not heard, his right of appeal is valueless.

[36] Having traced the history of the rule he continued at **page 575**:

> "It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance."

[37] Denning LJ next referred to what Sir George Jessel MR said in a similar connection in **Re Clements & Costa Rica Republic v Erlanger (1877) 46 LJ Ch. 375**. Denning LJ then stated:

> "Applying this principle, I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."

[38] **Midland** was a case in which the court heard an applicant who was in contempt in not having complied with an order for discovery. Oliver J stated the general rule, and after considering **Hadkinson** concluded:

> "In my judgment, the fact that in the instant case the applicant is in contempt ought not to prevent the hearing of the substance of this application, although I think that it may well be that, if the applicant were to succeed in establishing that the order was, as she claims, insupportable in law, it should be set aside only on terms that, however belatedly, the order for discovery is complied with. In view of the pending appeal of the plaintiffs that might not be altogether an academic exercise."

[39] In **X Ltd v Morgan Grampian (Publishers) Ltd [1990] 2 All ER 1 (X Ltd)**, the House of Lords held that it had a discretion whether to hear a contemnor who had not purged his contempt and in deciding whether to bar a litigant the court should adopt a flexible approach. In approving the dictum of Denning LJ, Lord Bridge of Harwich stated at **page 11**:

> "I cannot help thinking that the more flexible treatment of the jurisdiction as one of discretion to be exercised in accordance with the principle stated by Denning LJ better accords with contemporary judicial attitudes to the importance of ensuring procedural justice than confining its exercise within the limits of a strict rule subject to defined exceptions. But in practice in most cases the two different approaches are likely to lead to the same conclusion, as they did in Hadkinson's case itself and would have done in The Messiniaki Tolmi [1981] 2 Lloyd's Rep 595.
>
> Certainly in a case where a contemnor not only fails wilfully and contumaciously to comply with an order of the court but makes it clear that he will continue to defy the court's authority if the order should be affirmed on appeal, the court must, in my opinion, have a discretion to decline to entertain his appeal against the order."

[40] **X Ltd** was followed by the Court of Appeal of the Turks and Caicos Islands in **Hansen v Great Future International Ltd, Civil Appeal No. 7 of 2002**. There the court held that "it has a discretion to refuse to hear a contemnor who by his conduct has made it clear that he will never obey an order of this court or of any of the courts of this country with which he does not agree".

[41] The issue of contempt arose for consideration in **Dino Trading** where this Court had to determine whether to hear defendants who sought leave to appeal because it was alleged that they were in contempt of court, having failed to comply with an order to make certain disclosure. After considering the facts and reviewing the authorities

cited by counsel, this Court applied Denning LJ's test and refused leave to appeal on the ground that the neglect or refusal of the defendants to comply with the terms of a Mareva injunction constituted a contempt of court which went to the very root of the litigation and was calculated to impede the course of justice.

[42] In this case the appellant, in challenging the dismissal of its claim and the order that it should pay the respondent's costs, is exercising its right to be heard as an appellant as is provided for by **Cap. 117A**. Access to the courts is a right to which every person is entitled in order to obtain a remedy for an alleged breach of legal or equitable rights. It is an important right which the state has made available to all persons as a means for the just and peaceful settlement of disputes between them. Once this right is exercised however, and an order has been made by the court, a party is under an obligation to comply with that order, even if he believes that the order is irregular or even void.

[43] This Court is ever mindful of the necessity to ensure that orders of court are complied with, and disobedience of such orders is not treated as a trivial matter, since such disobedience can undermine the authority of the Court. Notwithstanding the above, we are of the

opinion that there are circumstances where although a party has not complied with an order, this Court should not, in its discretion, refuse to hear that party unless the interests of justice so require. In our view it must be shown that the disobedience to an order of court will impede the course of justice in the cause and impair the ability of the court to enforce its orders.

[44] Having reviewed the facts and circumstances, it is our judgment that the failure of the appellant to pay the High Court costs as ordered will not impede the course of justice in this case. We therefore have determined that this Court's discretion should not be exercised so as to disallow the appellant from proceeding with the appeal.

[45] It is undisputed that no stay of the costs order was sought or granted, and it is therefore open to the respondent to proceed to execution in order to have that order satisfied.

The Costs of the Application

[46] This was an interlocutory application. **Rule 65.11** sets out the procedure to be followed by this Court when it is assessing costs in respect of interlocutory applications.

[47] According to **rule 65.11(2)**, in deciding what party, if any, should pay the costs of the application, the general rule is that the unsuccessful

party must pay the costs of the successful party. The Court must, however, take account of all the circumstances including the factors set out in **rule 64.6(5)**. It has not been argued that the general rule should not apply in this case. Having considered all the circumstances and the relevant factors, we conclude that the respondent is entitled to costs payable by the appellant.

[48] As to the assessment of those costs, we have been guided by the provisions of **rule 65.11(4)** to **(7)**. The Court has not been provided with a brief statement as is required by **rule 65.11(5)**. We consider that an amount of $3,000.00 would be an appropriate award for costs in this case.

Disposal

[49] It is ordered that:

1. The appellant shall pay into Court the sum of $117,975.65 together with Value Added Tax thereon of $20,645.74 (or provide a bond from an acceptable commercial bank in Barbados in favour of the respondent to cover such security) as security for the costs of the respondent in these proceedings.

2. Unless the appellant pays into Court (or provide a bond from an acceptable commercial bank in Barbados in favour of the respondent to cover such security) the security for the costs of the respondent in these proceedings as set out in paragraph 1 above within 21 days of the date of this order, these

proceedings shall be stayed until such time as security for costs is given.

3. The appellant shall pay the respondent's costs of this application which have been assessed at $3,000.00 on or before 30 June 2016.

Justice of Appeal Justice of Appeal

CONCURRING JUDGMENT

GIBSON CJ:

[50] I have read in draft the proposed judgment of ***Goodridge JA*** and I entirely agree with the conclusion. However, we reach that terminus by different routes and I confine myself to discussing the decisions on security for costs, particularly as exemplified in the recent jurisprudence of the ***Caribbean Court of Justice*** (***CCJ***) in ***Knox v Deane***, ***[2012] CCJ 4***, and of this Court in ***Hoyte v Electrical Sales & Services Ltd Civil Appeal No. 6 of 2013 decided 9th May 2014*** (*per* ***Goodridge JA***).

[51] In August 2006, the appellant company, Apsara Restaurants (Barbados) Ltd ("Apsara" or "the appellant"), opened two restaurants which it operated on the south coast of Barbados. One month

previously, in or about July 2006, Apsara, acting through its owners/directors, Ms. Marie Kavanaugh and Mr. Sharif Mohammed, had appointed Lynch Insurance Brokers as its agent to effect insurance on the contents and leasehold improvements of its restaurants.

[52] Apsara instructed its broker to place insurance with the respondent company, Guardian General Insurance Limited ("Guardian" or "the respondent"), and on 5 April 2007, Guardian effected a policy of insurance against loss or damage by fire in the sum of $6.5 million. Just over four and a half months later, in the early hours of the morning of 27 August 2007, a fire destroyed the appellant's restaurants and the contents therein. They delivered a claim for loss under the policy which Guardian refused to honour. Apsara thereafter commenced an action in the High Court against Guardian seeking damages of just over $6 million.

[53] The matter came on for hearing before ***Crane-Scott J***, who dismissed the appellant's claim. The learned judge ruled that the respondents were "entitled to avoid *ab initio* by reason of material non-disclosures", and that they had to return all premiums paid under the insurance policy to the appellants.

[54] Costs were certified fit for two attorneys-at-law to be assessed if not agreed. The parties agreed costs in the amount of $176,963.48, exclusive of VAT, and Guardian's expert witness' costs of $88,612.06. To date, appellant Apsara has neither paid the agreed costs nor the expert witness' costs.

[55] Notably, Apsara never filed an application to stay the costs order.

[56] On 11 November 2013, Apsara appealed against the decision of ***Crane-Scott J***. By application filed 6 May 2015, as amended 8 June 2015, Guardian sought security for the costs of this appeal. It is that application which now engages this Court's attention.

The Application

[57] The respondent applied for the following orders:

1) Pursuant to ***Rule 62.17*** of the ***Supreme Court (Civil Procedure) Rules*** **("*the CPR*")** that the appellant pay into Court the sum of $117,975.65, together with VAT thereon of $20,645.74 (or provide a bond from an acceptable commercial bank in Barbados in favour of the respondent to cover such security) as security for the costs of the respondent in the current appellate proceedings.

2) Pursuant to ***Rule 65.7(a) – (d)*** of the ***CPR*** that the appellant pay to the respondent the sum of $88,612.06 in respect of its expert costs.

3) The appellant pay to the respondent agreed costs in the amount of $176,963.48 together with VAT thereon of $30,968.61 as ordered by the High Court in the proceedings below.

4) Pursuant to ***Rule 24.5*** of the ***CPR*** that unless the Appellant pay into Court (or provide a bond from an acceptable commercial bank in Barbados in favour of the respondent to cover such security) the security for the costs of the respondent in these proceedings sought in paragraph 1 above within 14 days of the date of such Order, that these proceedings be stayed until such time as security for costs is provided.

5) Unless the appellant pays to the respondent the agreed costs as ordered by the High Court in the proceedings below together with its experts' costs, that these proceedings be stayed until such time as the appellant pays such costs.

[58] The respondent's application was based on three grounds:

1) On 25 October 2014, ***Crane-Scott J*** ordered that the appellant's claim be dismissed with costs to be assessed if not agreed.
2) The parties had agreed costs of $176,963.48 exclusive of VAT, the respondent's experts witness costs which total $88,612.06. Appellant had failed and/or refused to pay the prescribed costs as agreed between the parties.
3) The appellant herein will be liable to pay a further $117,975.65 exclusive of VAT if it is unsuccessful in this Appeal.

Submissions

[59] Before this Court, Mr. Shepherd QC for Apsara, conceded that Guardian was entitled to seek security for costs and indicated that Apsara was willing to produce a bond to guarantee payment of the costs agreed in the High Court and the costs of the appeal. There was some difference of opinion between him and Mr. Audain for Guardian as to the amounts, for while Mr. Shepherd QC thought that the amount of costs agreed was $176,000.00 which, together with VAT, would total $180,000, Mr. Audain stated that the exact amount was $176,963.48 plus VAT for a total of $207,932.89.

[60] Undeterred by Mr. Shepherd's concession, however, Mr. Audain contended that Apsara's unwillingness and/or inability to pay costs as ordered by the High Court, and agreed to by both parties, raised doubts as to its willingness or ability to meet costs that may be awarded against it in this Court. Relying on, among other authorities, the decision of this Court in ***Dino Trading and Services PTE Ltd et al v Steven Steel Supply*** **Civil** ***Appeal No 3 of 2000 decided 19 April 2000*** (***Williams CJ, Chase and Colin Williams JJA***), and ***Hadkinson v Hadkinson [1952] 2 All ER 567***, Guardian submitted that this was a form of contempt that had to be purged before the appeal could be heard.

[61] Guardian further urged that in cases where a party was acting vexatiously in withholding payment of costs, the court had jurisdiction to stay proceedings until he had complied with the order for payment (***Neal Weston v Neal (1886) 31 CH. D 437 per Bacon VC***). Mr. Audain also cited ***Thames Investment and Securities plc v Benjamin and Others [1984] 3 All ER 393*** where the ***UK Court of Appeal*** held that

> [w]here an application for particular relief is dismissed with costs and the applicant has failed to pay the costs the court should, as a general rule, exercise its discretion to refuse to allow the applicant to make a second application for the same or equivalent relief.

> Although the applicant cannot be said to have failed to pay the costs of the first application until they have been qualified, nevertheless where they have not been quantified by the time of the second application, then in fairness to the respondent the second application ought to be stayed until the applicant pays into court the court's estimate of the costs of the first application.

[62] Guardian further submitted that the court retained a discretion whether or not to hear a party in contempt and it could refuse to hear a party only in those occasions when his contempt impedes the course of justice and there was no other effective way of enforcing his obedience. Mr. Audain argued that, under the ***Supreme Court of Judicature Act***, ***section 61 (g)***, the Court of Appeal also had authority to make any order as it related to costs relative to proceedings in the original court, as it thinks fit. Further, while the court was constrained to make orders for security for costs only with respect to the appeal itself, there was no similar constraint as far as staying the appellant's appeal until such time as it complied with the order of the original court.

[63] Mr. Shepherd QC for Apsara replied that this matter was not strictly speaking one of contempt as the disobedience was not to an order for payment. Since Guardian had open to it the process of execution of the judgment, a stay was therefore not the only method of ensuring compliance and was not necessary to ensure that justice was achieved.

Without an order from the Court staying the execution, the respondent could proceed to execute the judgment and was thus not without a remedy for the failure of a litigant to satisfy any judgment.

[64] He submitted that Guardian had relied on the principle enunciated by ***Romer*** and ***Denning LJJ*** in ***Hadkinson v Hadkinson***, *supra* **(**quoted in ***Dino Trading)***. There ***Romer LJ*** had stated, at p. 569 that as long as the person affected by an order believed it to be irregular or void, he should apply to the court to have it discharged but as long as it existed it had to be obeyed. ***Denning LJ*** stated the rule in more qualified terms at p. 575. If a party disobeyed an order of the court, that was not in itself a bar to his being heard, but

> if the disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.

Discussion

[65] ***Section 61(1)(h)*** of the ***Supreme Court of Judicature Act Cap117A*** provides that the Court of Appeal may "in special circumstances, order that such security be given for the costs of an appeal as appears just." ***CPR Part 62.17*** deals with the issue of security for costs of an appeal. It provides, so far as pertinent, as follows:

> 62.17 (1) The Court in special circumstances within section 61(1)(*h*) of the Act may order
>
> (a) an appellant; or
>
> (b) a cross-appellant
>
> to give such security for the costs of the appeal or cross-appeal, as the case may be, as appears just.
>
> (2). . .
>
> (3) In deciding whether, in such a case, to order a party to give security for the costs of an appeal, the court must consider
>
> (a) the likely ability of that party to pay the costs of the appeal or cross-appeal; and
>
> (b) whether in all the circumstances it is just to make the particular order sought.

[66] In ***Knox v Deane***, *supra*, the CCJ considered the provisions of both the statute and the ***CPR***. In that Court, ***Nelson JCCJ*** noted the four requirements emanating from the Rules. First, "the Rule requires an applicant to prove that there are 'special circumstances' which make it difficult to enforce a costs order against an appellant." His Honour further opined that "[t]hese special circumstances should be identified by the Court of Appeal. . ." ***([2012] CCJ 4***, at ***para [35]***). Secondly, that the applicant must make a prior request in writing for security.

[67] ***Nelson JCCJ*** continued:

> Thirdly, the applicant must present for the consideration of the court the likely ability of the appellant to pay the costs of the appeal, if unsuccessful. It is to be noted that this provision may not be

> synonymous with proof of impecuniosity, which dominated the written submissions and the oral arguments of counsel. The wording of Rule 62.17 refers to "likely ability … to pay the costs of the appeal" and not to impecuniosity. On the wording of Rule 62.17 a poor appellant who had access to financial backing may not be ordered to pay security for costs.

[68] The fourth "determining factor is that the award of security for costs must, in the final analysis, be 'just' in all the circumstances. . [C]ourts are anxious to preserve access to justice for persons. . .who are brought before the courts to defend litigation and are desirous of continuing their defence, so to speak, by way of appeal." (*Ibid*, at paras [37,40]; see, also, *per* ***Goodridge JA*** in ***Hoyte v Electrical Sales & Services Ltd***, *supra).*

[69] This concern to preserve access to justice permeates the cases on security for costs since such an order has the potential to stifle a claim or indeed an appeal. Hence, in ***Ali v Hudson [2003] EWCA Civ. 1793***, a case in which the appellant had sued his solicitor for breach of contract and professional negligence, the action was struck out as disclosing no cause of action and as being frivolous and vexatious. Mr. Ali was ordered to pay costs and, on appeal, respondent, Mr. Hudson, sought security for costs.

[70] In the Court of Appeal, ***Clarke LJ*** held that the power to order security for costs had to be exercised with great caution. His Lordship summarized the correct general approach as follows:

> 1) it would only be in an exceptional case (if ever) that a court would order security for costs if the order would stifle a claim or an appeal;
>
> 2) in any event,
>
> a) an order should not ordinarily be made unless the party concerned can be shown to be *regularly flouting proper court procedures* or otherwise to be demonstrating a want of good faith; good faith being understood to consist of a will to litigate a genuine claim or defence (or appeal) as economically and expeditiously as reasonably possible in accordance with the overriding objective;
>
> b) an order will not be appropriate in every case where a party has a weak case. The weakness of a party's case will ordinarily be relevant only where he has no real prospect of succeeding.
>
> 3) There should be some appropriate enquiry as to whether the party concerned has the means to pay the costs if awarded.
>
> (Emphasis added).

[71] One issue is whether the Court ought to direct the payment of fund into court as a condition precedent to permitting the appeal to proceed. This issue confronted the court in ***CIBC Mellon Trust Co and others v Mora Hotel Corp NV and another [2003] 1 All ER 564*** where the defendant companies were ordered to pay money into court in respect

of past costs orders as condition for proceeding with an application to set aside a default judgment.

[72] In that case, ***Peter Gibson LJ*** stated the relevant principles as follows:

> (i) The court has a complete discretion whether to order security and accordingly it will act in the light of all the relevant circumstances.
>
> (ii) The possibility or probability that the party from whom security for costs is sought will be deterred from pursuing its appeal by an order for security is not without more a sufficient reason for not ordering security.
>
> (iii) In considering an application for security for costs, the court must carry out a balancing exercise. That is, it must weigh the possibility of injustice to the appellant if prevented from pursuing a proper appeal by an order for security against the possibility of injustice to the respondent if no security is ordered and the appeal ultimately fails and the respondent finds himself unable to recover from the appellant the costs which have been incurred by him in resisting the appeal.
>
> (iv) In considering all the circumstances, the court will have regard to the appellant's chances of success, though it is not required to go into the merits in detail unless it can be clearly demonstrated that there is a high degree of probability of success or failure.
>
> (v) Before the court refuses to order security on the ground that it would unduly stifle a valid appeal, it must be satisfied that, in all the circumstances, it is probable that the appeal would be stifled.
>
> (vi) In considering the amount of security that might be ordered the court will bear in mind that it can order any amount up to the full amount claimed, but it is not bound to order a substantial amount, provided that it should not be a simply nominal amount.

[73] The question then is, how do all the above principles apply to the case at bar? It is my view that, notwithstanding Mr. Shepherd QC's

concession that his client could be directed to give security for costs, the Court must still consider, as ***Goodridge JA*** quite properly does in her judgment, whether the appellant ought to be required to make a payment into Court *prior to* being allowed to continue the appeal.

[74] The overriding objective of the ***CPR*** is "to enable the court to deal with cases justly' and ***Part 62.17*** of those Rules, as is made clear by the ***CCJ*** in ***Knox v Deane***, and by ***Goodridge JA*** in ***Hoyte v Electric Sales***, *supra*, mandates that the court consider whether it is "just in all the circumstances" to make to order sought. The justice of which the ***CPR*** speaks is not one-sided and the appellant's access to justice and the concern with stifling the appeal are not the only relevant considerations, however overarching they may initially appear. The Court must very seriously, in the words of ***Peter Gibson LJ***, *supra*, "weigh the possibility of injustice to the appellant if prevented from pursuing a proper appeal by an order for security against the possibility of injustice to the respondent if no security is ordered and the appeal ultimately fails and finds himself unable to recover from the appellant the costs which have been incurred by him in resisting the appeal."

[75] On this record, there are several "special circumstances", quite apart from considerations of contempt, justifying the imposition on the appellant the condition precedent of making a payment into court before permitting the appeal to continue. The first, of course, is that, to date the costs which the appellant and respondent *agreed* have not been paid. Secondly, at para [46] of her decision, ***Crane-Scott J*** referred to the fact that Apsara's directors, Ms. Marie Kavanaugh and Mr. Sharif Mohamed, were also the sole shareholders and directors of a company registered under the Companies Act of the Republic of Trinidad and Tobago named O'Meara Food Products Ltd, ("O'Meara"); that a judgment in the sum of TT $1,060,075.19 had been registered jointly and severally against O'Meara *and* against Ms. Kavanaugh and Mr. Mohamed for the failure to repay a bank loan which had been granted to O'Meara; and that the judgment debt remained unsatisfied at the 5 April 2007 date of the insurance contract. There was no evidence as to whether this judgment debt had ever been satisfied.

[76] Further, at paras [257]-[258] (p. 63) and [280] (p. 68) of her judgment, ***Crane-Scott J*** referred to the expert accounting evidence of Ms. Glenda Clarke that, based on Apsara's balance sheet, income

statement, management accounts and bank statements, the company's financial performance was poor and it had recorded losses of $1,391,000 as at 31 August 2007; that it had no cash and had to rely on cash injections from its parent company in Trinidad. In addition, Apsara's total indebtedness was $8,975,895.70; its bank accounts were all in overdraft and the company had no cash. There is no evidence that this position has changed.

[77] In ***Keary Developments Ltd v Tarmac Construction Ltd*** **[1995] 3** ***All ER 534, 540, Peter Gibson LJ*** stated:

> [T]he court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As all this is *likely to be peculiarly within the knowledge of the plaintiff company,* it is for the plaintiff company to satisfy the court that it would be prevented by an order for security from continuing the litigation . . .
>
> (Emphasis added)

[78] While in ***Knox v Deane***, *supra*, ***Nelson JCCJ***, citing this Court's decision in ***Locke v Bellingdon (2002) 61 WIR 68***, *per* ***Sir David Simmons CJ*** at ***[83]***, made it clear that impecuniosity ought not, without more, to be the basis for an order for security for costs, the Court, after identifying any special circumstances, still has to ask itself the question what would be a just order in all the circumstances

of the case. In my respectful view, it is just to grant the respondent's application. Moreover, justice also demands that the respondent's ability to recover its costs in the court below, and of this application, should be protected by an order requiring that the appellant either pay the money into court or produce the bond as a condition precedent to being permitted to continue this litigation.

[79] Accordingly, I entirely agree with ***Goodridge JA*** that a stay of the appeal should be imposed until the condition precedent is satisfied, and I would dispose of this application as is directed in her judgment.

Chief Justice