[2020] JMCA App 4

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 62/2016

APPLICATION NOS 148, 149 & 206/2016

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**KARIN MURRAY**	**1ST APPLICANT**
AND	**KARIN MURRAY (in her capacity as representative of the estate of George Murray, deceased by order of the court made on 11.11. 2016)**	**2ND APPLICANT**
AND	**SAM PETROS**	**RESPONDENT**

Miss Carol Davis for the applicants

Hugh Small QC instructed by Hart Muirhead Fatta for the respondent

11, 29 November 2016 and 14 February 2020

MCDONALD-BISHOP JA

Introduction

[1] Three discrete but inter-connected applications were considered and determined by this court in these proceedings on 11 and 29 November 2016. The first application, (no 148/2016) arose from a notice of application for court orders filed by Karin Murray ("Mrs Murray") and George Murray ("Mr Murray"), ("the Murrays") on 8 August 2016,

and was for a stay of execution of the judgment of Batts J that was made in the Supreme Court on 19 May 2016, in favour of the respondent, Mr Sam Petros ("Mr Petros"). The second application (no 149/2016) filed on 8 August 2016, but amended on 1 November 2016, was to set aside, vary or discharge the order of a single judge of this court made on 15 July 2016.

[2] Prior to the hearing of those applications, Mr Murray unfortunately died. The third application (no 206/2016) was made by Mrs Murray by notice of application filed on 9 November 2016, "for directions to enable proceedings to be carried on after [a] party's death".

[3] Logically, application no 206/2016, albeit last in time, was treated with first as a preliminary application and the following orders were made:

> "Mrs Karin Murray is substituted for Mr George Murray in her capacity as representative for his estate for the purposes of the hearing of the applications.
>
> All documents relative to the hearing of the applications to be amended to reflect this order."

[4] On the conjoined substantive applications (nos 148/2016 and 149/2016), these orders were made:

> "1. Order of the Honourable Mr. Justice Morrison P. made on 15th July, 2016 is set aside.
>
> 2. The application for stay of execution having been re-heard on the amended notice of application for court orders filed on 1st November, 2016, the application for stay of execution of the judgment of the Honourable Mr. Justice Batts dated 16th June, 2016 is refused.

> 3. The Respondent, through his Attorneys-at-Law undertakes on behalf of himself and/or any nominee company not to sell, gift, exchange or otherwise dispose of his shares, the subject matter of the Claim on Appeal, and the shares shall remain in the name of the Respondent and/or his wholly owned nominee company until the determination of this Appeal or otherwise ordered by the Court.
>
> 4. Costs of the application to the Respondent to be agreed or taxed."

[5] We promised then to put the reasons for our decision on all three applications in writing at a later date. This is in fulfilment of that promise. The late delivery of these reasons is regretted. On behalf of the court, I extend sincere apologies.

The background to the proceedings in this court

[6] Mr Murray and Mrs Murray were husband and wife. They and Mr Petros are shareholders in two companies known as Tensing Pen Limited ("Tensing Pen") and Tensing Pen (Cayman Islands) Limited ("Tensing Pen Cayman") respectively, ("the companies"). Mrs Murray owns 500 shares, Mr Murray 500 shares and Mr Petros, 1000 shares in each company. Tensing Pen manages and operates a hotel in Negril in the parish of Westmoreland, on land owned by Tensing Pen Cayman.

[7] The parties have had several disputes concerning the management of Tensing Pen. These disputes included a claim filed by Mr Petros seeking relief against the Murrays, pursuant to section 213A of the Companies Act. The claim was settled by way of a Tomlin Order dated 29 November 2011, on terms set out in a schedule, which comprised an agreement between the parties. This Tomlin Order consequently led to a further dispute between the parties, which resulted in proceedings in the Commercial

Division of the Supreme Court before Batts J. On 19 May 2016, Batts J found in favour of Mr Petros and made a costs order against the Murrays.

[8] On 15 June 2016, the Murrays filed their notice and grounds of appeal from the judgment of Batts J, and on 16 June 2016, an application for a stay of execution of that order, pending the hearing of the appeal. The application for stay of execution was heard by Morrison P, sitting as a single judge in chambers. On 15 July 2016, Morrison P made an order in which he refused the application for stay of execution of the judgment of Batts J and ordered costs to Mr Petros, to be agreed or taxed.

[9] Following the ruling of Morrison P, the Murrays filed the application to set aside, vary or discharge his order on account of apparent bias and for a rehearing of the application for stay of the judgment of Batts J, by a different judge. They also applied for a stay of execution of the order of Batts J pending the determination of these applications.

I. Application No 206 /2016

Preliminary application for directions consequent on the death of Mr Murray

[10] Miss Carol Davis, counsel acting on behalf of the Murrays, at paragraph 5 of her affidavit sworn to on 9 November 2016, in support of the application for directions to enable the proceedings to be carried on consequent on Mr Murray's death, deposed that he died testate on 5 November 2016. A copy of his death certificate, together with his will, was exhibited to the affidavit. By his will, Mr Murray bequeathed, among other things, all interest or shares, which he possessed in Tensing Pen to Mrs Murray. Mrs

Murray was also named as an executrix of his estate. At the time of the hearing of the application, the will was not probated and proceedings had not yet commenced for that to be done.

[11] Miss Davis, relying on **Jamaica Redevelopment Foundation, Inc v Max Eugene Lambie (As Administrator of the Estate of Elaine Vivienne Tully, deceased)** [2012] JMCA Civ 12, as well as Part 21 of the Civil Procedure Rules, 2002 ("the CPR"), argued that, in order for a party to be substituted in a proceeding before this court, an application ought to first be made to the Supreme Court, appointing a personal representative. The most expedient arrangement which would allow the matter to proceed in this court, she posited, was for an emergency application for probate to be made to the Supreme Court and, thereafter, for an application to be made in that court for Mrs Murray to be substituted as a party to these proceedings, pursuant to Part 19 of the CPR.

[12] Counsel further submitted that Mrs Murray being a co-litigant, a personal representative, sole beneficiary of the estate, and her interest not being at variance with the deceased or the estate, made her the most appropriate person to be appointed to continue the litigation. Counsel maintained that the court was empowered to make orders to ensure that the appeal was properly managed and to allow the matter to proceed.

Discussion

[13] The Judicature (Appellate Jurisdiction) Act by virtue of sections 9 and 10, confers on this court, "...the jurisdiction and powers of the former Court of Appeal" and provides that "the Court shall ... have all the power, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations, 1958". In **Charles Stewart v Glennis Rose** (unreported), Court of Appeal, Jamaica, Motion No 15/1997, judgment delivered 17 June 1997, Downer JA concluded that:

> "...by legislative references in sections 9 and 10 of [the Act] it acquired the historic inherent, common law, equity and procedural powers of the former Appeal Court which was part of the Supreme Court prior to 1962. Further, the Supreme Court prior to 1962 and continuing to this day, has inherited all the powers of the courts which were consolidated to form one Supreme Court."

[14] In addition, rule 2.15(a) of the Court of Appeal Rules, 2002 ("the CAR") provides that in relation to civil appeals, the court has all the powers set out in rule 1.7 and "in addition all the powers and duties of the Supreme Court...," this includes, case management powers. Further, rule 1.7(2)(n) of the CAR enables this court, as part of its general case management powers, to, among other things, take any step, give any other direction or make any order for the purpose of managing the appeal and furthering the overriding objective.

[15] Given that the court has all the powers of the Supreme Court as it stood prior to 1962, by virtue of the Act, and all the duties and powers of the Supreme Court in civil appeals, to include case management powers, by virtue of the CAR, I found it

unquestionable that this court could substitute a party for the purpose of managing the appeal and furthering the overriding objective. See **Delroy Officer v Corbeck White (in her capacity as representative of the estate of Berthram White, deceased)** [2016] JMCA Civ 45.

[16] In making the necessary orders for the application to proceed, reliance was placed on certain provisions of Parts 19 and 21 of the CPR.

[17] By virtue of Part 19 of the CPR, the Supreme Court has the power to add, substitute or remove a party on or without an application, after proceedings have commenced, if it is desirable that any of those steps be taken in order for the issues before the court to be resolved.

[18] Rule 21.7 of the CPR provides that:

> "(1) Where in any proceedings it appears that a deceased person was interested in the proceedings then, if the deceased person has no personal representatives, the court may make an order appointing someone to represent the deceased person's estate for the purpose of the proceedings.
>
> (2) A person may be appointed as a representative if that person -
>
> > (a) can fairly and competently conduct proceedings on behalf of the estate of the deceased person; and (b) has no interest adverse to that of the estate of the deceased person."

[19] The court is further empowered by rule 21.8 of the CPR, where a party to proceedings dies, to give directions to enable the proceedings to be carried on, with or without an application before the court.

[20] I concluded that there was no requirement in law for the matter to be remitted to the Supreme Court for the will to be first probated and for a personal representative to be appointed to act for the estate of Mr Murray for the purposes of the hearing of the applications emanating from the appeal. As submitted by Miss Davis, Mrs Murray's interests in these proceedings are clearly not in conflict with that of the estate of Mr Murray, when the facts from which the matter has emanated are considered. She is named as executor to Mr Murray's estate, and the sole beneficiary under the purported will. Even if the will were to be declared invalid, she, as his spouse, would be entitled to share in his estate on intestacy, and would be absolutely entitled to his personalty. Furthermore, and even more significantly, she has been a party to these proceedings with Mr Murray since its inception and they both shared identical interests in the outcome of these proceedings as well as the substantive appeal.

[21] I could discern no potential conflict of interest and risk of injustice in appointing her for the limited purpose of the hearing of these applications, which were originally filed by Mr Murray, in his own right, with her as co-applicant. Mrs Murray was regarded as someone who would be able to fairly and competently carry on these proceedings on her own behalf as well as on behalf of the estate of Mr Murray.

[22] It was for all the foregoing reasons that it was ordered that Mrs Murray be appointed to represent the estate of Mr Murray and to be substituted for Mr Murray for the purposes of the hearing of the substantive applications (nos 148/2016 and 149/2016) and that the record be ordered to reflect this change in relation to the parties.

[23] By way of an aside and for the purpose of information only, it is considered useful to point out, parenthetically, that since the decision in this case had been given, and before the delivery of these written reasons, sections 9 and 10 of the provisions of the Judicature (Appellate) Jurisdiction Act as well as the dicta from **Charles Stewart v Glennis Rose** became the subject of discussion by this court in **Paul Chen Young and others v Eagle Merchant Bank Jamaica Limited and another** [2018] JMCA App 7. Reference is made to this latter decision for a more thorough exploration of the powers of this court, which include an inherent power to manage cases properly brought within its jurisdiction. See also **Richard Hall v Zada Hall** [2017] JMCA App 27, in which this court examined its powers to appoint a representative for the purposes of carrying on an appeal upon the death of one of the parties to the appeal.

[24] In the light of the dicta on this issue from these subsequent cases, this court would have been justified in making the order it did for the proceedings to continue by Mrs Murray upon the death of Mr Murray.

II. Application No 149/2016

The application to set aside, vary or discharge the order of the single judge

The relevant factual background

[25] The facts pertinent to the application for the setting aside of the order of Morrison P, as garnered from the record of the court, were accepted to be as follows. Following the giving of the reasons for the decision of Morrison P for refusing the Murrays' application to stay the execution of the judgment of Batts J, the Murrays caused their attorney-at-law to write to the Registrar of this court, by letter dated 27 July 2016, requesting a meeting with Morrison P. The letter stated, in part, that Mrs Murray had discovered that the wife of Morrison P ("Mrs Morrison"), was a partner in the law firm of Hart Muirhead Fatta, which has conduct of the matter on behalf of Mr Petros.

[26] Counsel made a request to appear before Morrison P to discuss the situation and to determine whether any further directions, treating with Mrs Murray's concerns, should be given by him. At the meeting held, by way of teleconference, Miss Davis indicated that neither herself nor her clients were aware at the time of the hearing of the application before Morrison P that his wife was a partner at Hart, Muirhead Fatta. Morrison P indicated that he had heard the matter without disclosing his wife's association with the firm because he was under the assumption that the facts were known to the parties and that they could have made objections but did not do so.

[27] Miss Davis, referencing rule 1.7(7) of the CAR, submitted that the court was empowered to vary or revoke any order it made and as such, Morrison P should revoke

the order that had been made by him in the matter. Morrison P referenced rule 2.11(2) of the CAR and indicated that he, having concluded the matter, was not empowered to revoke the order that he had made.

[28] On 11 August 2016, the matter came up for hearing before P Williams JA (Ag), (as she then was), sitting in chambers as a single judge. Upon reviewing the matter, P Williams JA (Ag) directed that the matter should be heard by the full court. The amended application was, therefore, made to this court for the order of Morrison P to be set aside and for the matter to be remitted for fresh consideration by a single judge of this court.

[29] That application (to set aside the order of Morrison P) was supported by the affidavit of Mrs Murray filed on 31 August 2016. Mrs Murray deposed that after being informed of the decision of Morrison P, and prior to seeing the written reasons for his decision, she was informed by a friend that Mrs Morrison is a partner in the firm, Hart Muirhead Fatta, which appeared for Mr Petros in the case. She later confirmed this information, she said, by doing "a simple internet search". She then stated at paragraphs 11- 14 of her affidavit:

> "11. Had I been advised beforehand of the relationship between the learned President and the Attorneys for the Respondents, I would most certainly have objected to him hearing the matter, and instructed my Attorneys if necessary to make application that he recuse himself because of the close relationship between himself and the Respondent's Attorneys.
>
> 12. I would have objected because I think that the close relationship between the learned President and the

> Attorneys for the Respondent means that he had a potential conflict of interest, and could not deal with my matter fairly.
>
> 13. Further I believe that at the very least my Attorney at the hearing should have been told of the relationship between the wife of the Honourable President and the Attorneys for the Respondent, and that I should have been given an opportunity to indicate my objection.
>
> 14. Most importantly we are of the view that we did not get a fair hearing, and that in the circumstances our application should now be heard before a fresh and impartial Judge of Appeal."

[30] Mr Petros, initially, opposed the application, for reasons deposed to in the affidavit of Mr Conrad George, counsel from Hart Muirhead Fatta, who had conduct of the matter on behalf of Mr Petros. Mr George admitted that Mrs Morrison is a partner in the firm. He deposed that Mr Petros is one of the firm's several clients, who is engaged in an "entire contract" with the firm in relation to litigation. As such, he would be required to pay for all work done on his behalf, whether he was successful or not in the litigation.

[31] He further deposed that the attorneys-at-law who originally had conduct of the matters for the Murrays, including Mrs Jennifer Messado, were "certainly well aware of Mrs Morrison being a partner at Hart Muirhead Fatta". With respect to Miss Davis, he averred that although he could not "state as a matter of certainty that Miss Davis had actual knowledge" of Mrs Morrison's partnership at Hart Muirhead Fatta, he knew that the firm, over the years, had sent to her several pieces of correspondence on its

letterhead, which listed the partners of the firm. He exhibited one such letter addressed to Miss Davis, which showed Mrs Morrison to be a partner in the firm.

[32] Mr George did not indicate, however, whether or not Mrs Morrison had ever dealt with Mr Petros, whether directly or indirectly, in relation to this case or any other. The affidavit was, therefore, silent to Mrs Morrison's involvement or lack of involvement in this case or with Mr Petros as a client of Hart Muirhead Fatta.

[33] Miss Davis, in reply to the evidence of Mr George, contended that although the letter may have borne the name of Mrs Morrison, she had not taken any note of it, prior to the complaint of the Murrays. Counsel contended further that, even if she had known, it cannot be said that the Murrays had waived their right to raise the issue of the apparent bias of Morrison P. She submitted that a waiver must be unequivocal and based on full facts being disclosed to the parties for them to opt to waive their right to object to a judge hearing the matter. The right to waive the objection is not for a party's attorney-at-law, she said. She argued further that, in any event, the court should take note that the affidavit of Mr George did not explicitly deny Mrs Morrison's involvement with the matter. She maintained that as a partner in the firm with an "entire contract" with Mr Petros, Mrs Morrison had a direct interest in the outcome of the matter.

[34] Counsel concluded that once apparent bias is accepted, the judgment is "tainted" (even if not consciously). Miss Davis, in describing Morrison P's judgment as "tainted" explained that whilst it could not be said that his integrity was in question or that there

was actual bias on his part, Mrs Morrison, being a partner in the firm representing Mr Petros, with a likely interest in the outcome, meant that he had more than a "peripheral interest" in the case. According to Miss Davis, these circumstances could, indeed, lead a fair-minded and informed observer to conclude that there was a real possibility that Morrison P may have been biased.

[35] In seeking to establish that the order of Morrison P ought to be set aside based on non-disclosure and apparent bias, Miss Davis relied on **Winston Finzi and Mahoe Bay Company Limited v JMMB Merchant Bank Limited** [2015] JMCA App 32. She pointed out that in that case, Morrison P had made disclosure, on his own initiative, of the fact that one of the parties was a former client of his wife, when she was attached to another firm of attorneys-at-law.

[36] Counsel also directed the court's attention to the well-known dictum of Lord Hewart, the then Lord Chief Justice of England and Wales, in **R v Sussex Justices, ex parte McCarthy** [1924] 1 KB 256 at 259, that "[i]t is not merely of some importance, but of fundamental importance that justice should not only be done, but should manifestly be seen to be done".

[37] Miss Davis was allowed by Mr Petros' counsel to make full submissions with no indication of any concession on their part. It was during the course of Mr Hugh Small QC's response, on behalf of Mr Petros, that the concession was made that, given that no opportunity was given for the Murrays (as distinct from their attorney-at-law) to state their objection to Morrison P hearing the application, there can be no waiver of

their right to state an objection on the ground of apparent bias. Therefore, for the proper administration of justice, the order setting aside the decision of Morrison P should be granted.

[38] Learned Queen's Counsel unequivocally pointed out, however, that he did not accept that the decision of Morrison P was tainted or in any way contaminated as contended by Mrs Murray and her counsel. However, the basis on which the court should act, he said, "is in the protection of the administration of justice and the preservation of the principles of judicial integrity as seen by the informed observer". According to learned Queen's Counsel, one of the well-established guiding principle is that stated by Lord Buckmaster in **Sellar v Highland Railway Co** 1919 SC (HL) 19 and cited in **Jones v DAS Legal Expenses Insurance Co Ltd and others** [2003] EWCA Civ 1071, that:

> "The importance of preserving the administration of justice from anything which can even by remote imagination infer a bias or interest in the judge upon whom falls the solemn duty of interpreting the law is so grave that any small inconvenience experienced in its preservation may be cheerfully endured."

[39] Mr Small, for the record, also took responsibility for not having raised the issue before Morrison P at the time of the hearing in the absence of objection from the Murrays' attorneys-at-law. Mr Small expressed the view that there is no doubt that Morrison P is of the highest integrity but, given the test for apparent bias, and given that no opportunity was given to the Murrays to waive their objection, it is best, in

keeping with the highest tradition of the judiciary, to discharge the order he made. Against this background, Mr Small accepted that the matter ought properly to have been listed before another judge.

Discussion

[40] The concession of Mr Small was one rightly made, albeit a bit late in the proceedings. Given the sensitivity of the issue of apparent bias on the part of a judge, it is considered incumbent on this court to not only provide the reasons for our decision to set aside the order of Morrison P but to also act on the suggestion of Mr Small that the court should seize the opportunity to offer renewed guidance to judges in treating with the issue of recusal on the ground of bias. This is my attempt at doing so.

[41] It is clear from the submissions of counsel on both sides that there was no basis to allege actual bias on the part of Morrison P. The issue related to apparent bias. The law is replete with strong authorities that have established what is apparent bias and the test to be applied in determining whether it arises in a given situation.

[42] **Locabail (UK) Ltd v Bayfield Properties Ltd and another** [2000] QB 451 is one of many authorities that has provided added clarity to the issue of bias. At pages 471 and 472 of the report, the following guidance is given by their Lordships:

> "3. Any judge (for convenience, we shall in this judgment use the term 'judge' to embrace every judicial decision-decision maker, whether judge, lay justice or juror) who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to which we have referred and violates one of the most fundamental principles underlying the administration of justice. Where in

any particular case the existence of such partiality or prejudice is actually shown, the litigant has irresistible grounds for objecting to the trial of the case by that judge (if the objection is made before the hearing) or for applying to set aside any judgment given. Such objections and applications based on what, in the case law, is called 'actual bias' are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists."

[43] Further, at paragraph 480, the court stated:

"25. ...By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v. Kelly* (1989) 167 C.L.R. 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more

> found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal."

[44] Later, the House of Lords in **Magill v Porter; Magill v Weeks** [2001] UKHL 67, laid down the more modern test to be applied in considering whether a situation gives rise to apparent bias. The test, according to the House, through the words of Lord Hope of Craighead, is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. This is a modification of the test previously laid down in **R v Gough** [1993] AC 646.

[45] In **Helow v Secretary of State for the Home Department and another** [2008] 1 WLR 2416, Lord Hope of Craighead highlighted the qualities of the fair-minded and informed observer. His Lordship said at paragraphs 2 and 3:

> "2. The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson* (2000) 201 CLR 488 , 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.
>
> 3. Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced

> approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

[46] Case law has authoritatively established that it is for the court to ascertain all the circumstances which have a bearing on the suggestion that a judge was biased. That is, to find and examine the material facts that the fair-minded observer would know, on the balance of probabilities, and having done so, to make a determination whether, with knowledge of the facts so found, the fair-minded and well-informed observer could have formed the view that there is a real possibility of bias. See **Attorney General of the Cayman Islands v Tibbetts** [2010] UKPC 8 and **Belize Electricity Limited v Public Utilities Commission** Civil Appeal No 8 of 2009, delivered 8 October 2010, at paragraph 8.

[47] In the circumstances of this case, the informed observer would know that Morrison P is the spouse of Mrs Morrison who is a partner in the firm of attorneys-at-law, which is representing Mr Petros, one of the litigants in the case. That observer would know that Mr Petros has "an entire contract" with the firm and would have to pay the firm, whether he wins or loses. The informed observer would also know that the connection between Mrs Morrison and counsel acting on behalf of Mr Petros in the matter is close and direct.

[48] The informed observer would note that there is no evidence to establish that Mrs Morrison has never personally dealt with this case or, generally, with Mr Petros, in his relationship with her firm. Mr George's affidavit was silent on that issue. There is, therefore, nothing to dispel any reasonable question arising as to whether Mrs Morrison may have had a close and direct relationship with this case and/or Mr Petros. Against this background, Morrison P did not disclose to the Murrays his connection with Mrs Morrison and her connection to Hart Muirhead Fatta, as he presumed that it was known to the parties and they had no objection to him hearing the case.

[49] In **Belize Electricity Limited v Public Utilities Commission**, a case heavily relied on by the Murrays, the issue of apparent bias arising in the context of close familial relationship, between a sitting judge and a person associated with one of the litigants involved in a matter before him, was considered by the Court of Appeal of Belize. The facts of the case would prove quite useful. In a nutshell, they were as follows. Belize Electricity Limited ("BEL") and the Public Utilities Commission ("PUC"), through their attorneys-at-law, formulated three questions for the determination of the Supreme Court of Belize. The judge answered the questions in the affirmative. BEL appealed to the Court of Appeal against the determination of the judge. The appeal was heard by a three-member panel, which included Barrow JA. The court dismissed the appeal. BEL applied for the appeal to be reheard on the basis that Barrow JA's son was "associated and/or was involved and/or had an interest" as a Commissioner of the PUC. It was alleged that there was an appearance of bias on the part of Barrow JA. There was no suggestion or assertion that he was, indeed, biased.

[50] The issue for the court's determination was whether, having regard to the circumstances, there was an appearance of bias on the part of Barrow JA. The court, after a consideration and application of the 'Magill v Porter test', along with other principles extrapolated from other relevant authorities, concluded that there was, indeed, an appearance of bias. The court attached little weight to Barrow JA's explanation that the relationship with his son would have had no effect on him since the decision on appeal was based on the interpretation of the law.

[51] Mottley P, in coming to that conclusion, applied, among others, the principle deduced from the dictum of Devlin LJ in **R v Barnsley Licensing, ex p Barnsley and District Licensed Victuallers' Association** [1960] 2 QB 167 at 187, that:

> "...Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so."

[52] Mottley P also took into consideration the words of the Court of Appeal of England and Wales in **Locobail (UK) Ltd v Bayfield Properties**, in treating with the statement of Barrow JA, that:

> "… [T]he insidious nature of bias makes such a statement of little value, and it is for the reviewing court and not the judge whose impartiality is challenged to assess the risk that some illegitimate erroneous consideration may have influenced the decision."

[53] Citing the case of **Lawal v Northern Spirit Ltd** [2003] ICR 856, at paragraph 14, Mottley P at paragraph [29], made the incisive point, in the recorded words of Lord Steyn that, "[p]ublic perception of the possibility of unconscious bias is the key". Mottley P then stated at paragraphs [32] of the judgment:

> "...The public perception of unconscious bias may very well be present if it is known that a father is presiding over a case in which his son has an interest, if only peripherally."

He then concluded at paragraph [34]:

> "Even though the decision for the Court of Appeal was mainly, if not entirely a matter of legal interpretation, in my view, the fair-minded and informed observer would conclude that there is a possibility of bias when regard is had to the familial ties."

[54] Carey JA (with whom Sosa JA fully concurred), while not expressly endorsing Mottley P's views on unconscious bias, nevertheless concluded, for his part, that "the authorities and the learning" in treating with close family ties in circumstances in which bias is alleged, had left "no doubt in [his] mind that the appearance of bias can arise or arises in such circumstances".

[55] In examining the relationship between Morrison P and Mrs Morrison, the following dictum from **Locabail (UK) Ltd v Bayfield Properties Ltd**, proved instructive. It states:

> "10. While the older cases speak of disqualification if the judge has an interest in the outcome of the proceedings 'however small', there has in more recent authorities been acceptance of a de minimis exception... This seems to us a proper exception provided the potential effect of any

> decision on the judge's personal interest is so small as to be incapable of affecting his decision one way or the other; **but it is important, bearing in mind the rationale of the rule, that any doubt should be resolved in favour of disqualification. In any case where the judge's interest is said to derive from the interest of a spouse, partner or other family member the link must be so close and direct as to render the interest of that other person, for all practical purposes, indistinguishable from an interest of the judge himself**." (Emphasis added)

[56] Given the close connection between Mrs Morrison and the firm representing Mr Petros, coupled with the absence of evidence from the firm, or Mr Petros, that Mrs Morrison was never involved in this case or, generally, with Mr Petros as a client of the firm, it would have been more appropriate for Morrison P to disclose the familial connection between Mrs Morrison and him because the appearance of bias could arise or had arisen in the circumstances. The right to object to him hearing the matter lay with the Murrays and not with their counsel and the Murrays had not waived that right. The onus was, therefore, on Morrison P to make the necessary disclosure for the benefit of the Murrays.

[57] Mr Small had submitted that it should be adopted, as part of the practice of the court, that the duty to ensure that a matter is not heard by a judge whose spouse is a member of a firm that represents a party in the matter before that judge, rests equally on (a) the judge in question; (b) counsel appearing for the parties in the particular case; and (c) the registrar or other officers of the court with the responsibility of placing the matter before the particular judge. Learned Queen's Counsel opined that the best

practice to be adopted where, by inadvertence, there has been an oversight is that adopted by Morrison P in **Winston Finzi and Mahoe Bay Company Limited v JMMB Merchant Bank Limited**, in which a similar issue arose. In that case, as already indicated Morrison P had made disclosure on his own initiative and the parties were given an opportunity to consider the matter.

[58] In my view, while litigants, counsel, and the court personnel dealing with the court's list, could well play a crucial role in assisting the court to avoid issues of conflict of interest and bias arising during the course of proceedings, I would not elevate that assistance to being that of a duty. The duty, in my view, is solely that of the particular judge to make all the necessary disclosure of matters within his knowledge that could give rise to an argument for disqualification. The default position should always be to make full disclosure in situations where there is a potential conflict of interest or which could give rise to the appearance of partiality.

[59] The best course for a judge to adopt, upon becoming aware of a matter before him, which involves a family member or the firm to which a family member is attached, would be to advise the relevant listing officer to have the matter listed before another judge. This viewpoint reflects an endorsement of the guidance given by the Court of Appeal of England and Wales in **Jones v DAS Legal Expenses Insurance Co Ltd and others** at paragraph 35, which was relied on by the Murrays. In that paragraph, the court provided useful guidance to a judge who is faced with circumstances that may give rise to allegations of bias. At sub-paragraph 35 (i), their Lordships stated:

> "i) **If there is any real as opposed to fanciful chance of objection being taken by that fair-minded spectator, the first step is to ascertain whether or not another judge is available to hear the matter. It is obviously better to transfer the matter than risk a complaint of bias. The judge should make every effort in the time available to clarify what his interest is which gives rise to this conflict so that the full facts can be placed before the parties**." (Emphasis added)

At sub-paragraph (iv) – (vi), the court proceeded to further provide the following guidance to judges in dealing with litigants to whom disclosure should be made:

i) A full explanation must be given to the parties. That explanation should detail exactly what matters are within the judge's knowledge, which give rise to a possible conflict of interest.

ii) The options open to the parties should be explained in detail. The options are first, to consent to the judge hearing the matter, in which event, the parties will thereafter be likely to be held to have lost their right to object or second, to apply to the judge to recuse himself.

iii) The parties should be told it is their right to object, that the court will not find it amiss if the right is exercised and that the judge will decide having heard the submissions/objections.

iv) The parties should always be told that time will be afforded to reflect before electing. That should be made clear, even where both parties are represented.

v) Since this is a problem created by the court, the court has to do its best to assist in resolving it. Therefore, the court may rise for a few minutes to give parties time to consult and to obtain appropriate assistance, especially in the case of self-represented litigants.

[60] While there is good sense in adopting the guidelines provided in **Jones v DAS Legal Expenses Insurance Co Ltd and others**, as urged by Miss Davis, it should be noted that their Lordships themselves have cautioned against the use of the guidelines as constituting a checklist for all cases. They noted:

> "We repeat that this guidance is no more than that: this is not a checklist, still less a definitive checklist for all cases. Sometimes some of these suggestions may be adopted, sometimes none of them may apply. We wish strongly to disabuse any disgruntled litigant of the idea that he may seize upon this judgment and use it as the mantra for complaint about ill-treatment. Any attempt to do so will receive short shrift."

[61] Having paid due regard to the qualification of their Lordships, I found the guidance quite helpful in treating with this particular case. Having applied them to the circumstances of this case, I arrived at the conclusion that Morrison P's failure to make

the disclosure, and to advise the Murrays of their right to object to him hearing the case, was of sufficient gravity to vitiate his decision.

[62] I am impelled by the importance of the value of impartiality in the execution of the judicial funcion, to draw attention to Chapter 7 of the ***Judicial Conduct Guidelines of Jamaica, August 2014*** (which is on the websites of the Supreme Court and Court of Appeal). I would strongly urge that those guidelines be used by judges, as a key point of reference, along with the principles extracted from the relevant authorities, in treating with situations that would cause a fair-minded observer to question their impartiality.

[63] For present purposes, I will highlight some relevant portions of Chapter 7, under the heading, "Impartiality", which reads, in part:

> "7.4 Judges should disqualify themselves from participating in any proceedings in which they are unable to decide the matter impartially **or in which a reasonable, fair-minded and informed person might believe that the judge is unable to decide the matter impartially.**
>
> Commentaries:
>
> 1) **Impartiality is concerned with both perception and the actual absence of bias and prejudgment**. **This dual aspect of impartiality is captured in the often repeated words that justice must not only be done, but manifestly be seen to have been done. The test is whether a well-informed person, viewing the matter realistically and practically — and having thought the matter through — would apprehend a lack of impartiality in the decision maker. Whether there is a reasonable apprehension of bias is to be assessed from the point of view of a reasonable, fair minded and informed person.**

…

> provided, however, that disqualification of a judge shall not be required: (a) if the matter giving rise to the perception of a possibility of conflict is trifling or would not support on close analysis a plausible argument in favour of disqualification; (b) where no other tribunal can be constituted to deal with the case; or (c) where, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice. (Emphasis added)

[64] The commentaries on Chapter 7 further direct:

> "4) It is for the judge to make the decision on recusal, perhaps in consultation with a colleague. If the judge concludes that no reasonable, fair minded and informed person, considering the matter, would have a reasoned suspicion of a lack of impartiality, the matter should proceed before the judge. If the conclusion is the opposite, the judge should not sit. **The judge should generally make disclosure on the record and invite submissions from the parties in only two situations. The first arises if the judge has any doubt about whether there are arguable grounds for disqualification. The second is if an unexpected issue arises shortly before or during a proceeding. The judge's request for submissions should emphasise that it is not counsel's consent that is being sought but assistance on the question of whether arguable grounds exist for disqualification**." (Emphasis added)

[65] I, like my colleagues, entertained no doubt about the integrity and impeccable reputation of Morrison P as a jurist. However, the close familial tie between him and a partner of the firm representing one of the litigants before him gave rise to an arguable ground for disqualification. This called for disclosure by him to the Murrays of his relationship with Mrs Morrison, which was an essential material fact.

[66] The salutary aphorism that, "[i]t is not merely of some importance, but of fundamental importance that justice should not only be done but should manifestly be seen to be done", when joined with the popular expression that, "perception is more important than reality", serves to provide a compelling basis for disturbing the impugned decision. It was considered best, in the interests of the administration of justice, including the need to preserve public confidence in the judiciary, for the decision not to stand.

[67] It was for all the foregoing reasons that I concurred in the decision of the court that the order of Morrison P should be set aside and that the application for stay be considered by this court *de novo*. There was no need for the matter to be remitted to a single judge for consideration in chambers as applied for in the amended notice of application. As a consequence, the order detailed at sub-paragraph [4] (1) above was made.

III. Application No 149/2016

The application for stay of execution of the judgment of Batts J

[68] Attention will now be turned to the rehearing of the application for stay of execution of the order of Batts J (who will also be referred to in this section as "the learned trial judge").

[69] At the centre of the controversy between the parties that had to be resolved by the learned trial judge were the terms of the Tomlin Order dated 29 November 2011,

that was intended to settle the initial dispute between the parties concerning the purchase of shares in the two companies, Tensing Pen and Tensing Pen Cayman.

[70] The Tomlin Order read, in part, in so far as is relevant to these proceedings:

> "3. The Murrays will determine that either George Murray or Karin Murray will resign as a director of the Company.
>
> 4. An independent director, agreed to by Sam and the Murrays, will be appointed to the Company's board of directors within 14 days of this agreement, and it is agreed that such independent director should be chairman. The Company shall hold an Annual General Meeting within 60 days of the appointment of the independent director.
>
> ...
>
> 10. This agreement is being made to facilitate a settlement of disputes herein and to effect the Sale. The New Board will make the final determination as to the acceptability of any offer, and the parties hereto confirm the New Board's authority to do so.
>
> 11. In the event that the Sale is not effected, the parties agree that the Company (with the authority of Cayman, which its directors hereby give) will list the property with international hotel brokers to procure a purchaser at a price acceptable to the New Board. In the event that no acceptable offers are received within 12 months from the date of this Agreement, the parties shall lower the sale price as recommended by the said international hotels brokers every 4 months provided that if the price falls to US$3m the shareholders shall be entitled to lodge bids with the New Board to purchase the Corporate Entities and upon the New Board being satisfied that it holds the highest such offer for the Corporate Entities, the shareholder who has made such offer shall be entitled to purchase the other shareholders interest pro-rated based on such offer price.

...

13. No part of this Agreement may be varied altered suspended or amended by any party or by any resolution of the board without the joint mutual consent of every party to this agreement and parties agree that they will not vote at any meeting of shareholders or directors in such a manner as to make any part of this Agreement ineffective."

[71] In consequence of clauses 3 and 4 of the Tomlin Order, Mr Murray resigned as a director and on 5 February 2012, Mr Kenneth Tomlinson ("Mr Tomlinson"), of Business Recovery Services, was appointed as the independent director and chairman of the board of the companies. The Murrays and Mr Petros also agreed, among other things, that Mr Tomlinson would have the deciding vote in accepting bids or offers to purchase the shares in Tensing Pen and Tensing Pen Cayman.

[72] No suitable bids having been received in accordance with the formula provided for by the Tomlin Order, the parties agreed to a variation of clause 11 of the Order. They agreed to adopt a new process, wherein the shareholders would submit a bid for the purchase of all the issued shares of the companies held by the unsuccessful bidder. Thereafter, the bids would be submitted to the Board.

[73] As Mr Petros and the Murrays were members of the Board, it was agreed by them that Mr Tomlinson, "as agent for both sellers, would decide which offer was the highest and best". The parties further agreed that Mr Tomlinson would receive and consider bids from them on behalf of and as agent for both sides. The terms of the bidding process were both oral and contained in emails between the attorneys-at-law for the parties.

[74] Several emails were subsequently sent by the parties outlining how the bidding process would take place. For completeness, three email messages, which the learned trial judge considered relevant to the question of the precise terms of the new bidding process agreed by the parties, are outlined below.

[75] The first was an email dated 25 February 2013, from Mrs Jennifer Messado (the Murrays' attorney-at-law during the bidding process) to Mr George of Hart Muirhead Fatta (Mr Petros' attorney-at-law during the bidding process), which stated that:

> "We refer to our discussions and to the latest position that has been agreed on by the Conrad George team.
>
> 1. Bidding with the details regarding same to be presented by Monday the 25th February at 3:30 p.m.
>
> 2. Bidding to remain open for all parties to complete with details for the completion;
>
> 3. Bids to remain open until the 6th March 2013 when they will be closed;
>
> 4. The [decision (the actual word used in the email was 'discussions', but the learned trial judge stated at paragraph [25] of his judgment that it was common ground that this was 'a misprint for 'decision'')] to which bid is to be accepted will be solely that of Mr. Ken Tomlinson, the Chairman of the Board."

[76] The second email, also dated 25 February 2013, from Mrs Messado to Mr Tomlinson, Mr George and Mrs Murray stated that:

> "We refer to our discussions and to the latest position that has been agreed on by the Conrad George team.
>
> 1. Bidding with the details regarding same to be presented by Monday the 25th February at 3:30 p.m.

2. Bidding to remain open for all parties to complete with details for the completion.

3. Bids to remain open at the discretion of the Board Chairman on the understanding that the time for presentation will not exceed the 6th March 2013 when they will be closed;

4. The [decision] to which bid is to be accepted will be solely of that of Mr. Ken Tomlinson, the Chairman of the Board.

5. The best and final offers must be in by March 6, 2013;

6. Each party shall have 24 hours to respond to the bid.

7. Each party shall get a copy.

8. The Murrays will execute the first offer made today the 25th but it is hereby agreed that they are entitled to receive their future offers under the authority of Mrs. Messado.

Please confirm and approve."

[77] The final email, also of 25 February 2013, at 2:38 pm, was from Mr George to Mr Tomlinson. Of significance, is the fact that this email was not copied to Mrs Messado or the Murrays. The implications of this omission will be later considered below. The email reads, in so far as is relevant:

"Dear [Mr Tomlinson]:

I have had discussions with Mrs. Messado, who now represents the Murrays, and we have agreed that the auction of the shares in Tensing Pen Limited and scheduled for this afternoon will no longer take place. Instead, the Murrays and Mr. Petros will submit to you their respective offers to purchase the shares of each other, including price and any relevant terms by 3:30 p.m. today. You will be entitled to discuss each offer with the offerors with a view to obtaining clarification or improvement of any of the proposed terms (including but not limited to price) and having done so by no later than close of business on 6th March 2013, you will in your absolute discretion decide

> which offer is better. Upon you communicating your decision, the maker of the better offer will then purchase on the terms of such offer the shares of the other shareholder(s) in the above two companies, and such other shareholder(s) shall sell on these terms..."

[78] Before considering the offers that were made, pursuant to the above emails, note should be taken of a discussion which was initiated by Mrs Murray with Mr Tomlinson on 21 February 2013. That discussion concerned the payment of an interim dividend to shareholders out of accumulated profits for the financial year, commencing July 2012. In the email, which was also copied to Mr Petros and a Richard Murray, Mrs Murray reiterated a proposal, which she had made previously. That proposal was that, prior to the sale of the shares, the board should declare an interim dividend of US$60,000.00 on the year to date accumulated profit of US$134,114.00 and that all retained earnings, for the year ending 30 June 2012, be sold with the company. She indicated that Mr Petros had "voted no giving no explanation for his position". Mr Tomlinson was asked to state his position.

[79] On the same day, Mr Tomlinson emailed Mrs Murray, Richard Murray and Mr Petros advising that the matter would be discussed at the next meeting of the Board. He went on to say that:

> "...I have indicated to [Mr Petros] that prior to the transfer of the shares to the successful bidder, all share holders [sic] would be entitled to some form of dividend based on the profits of the company, as at the date of the transfer.
>
> Let us await the outcome of the February 2013 unaudited financials and then we can determine the level of distribution.

> Please note that based on the unaudited results for January 2013, Tensing Pen has just turned the corner in relation to profitability for this financial period, and it would be prudent to await the February accounts to see if the profitability projections are achieved...."

[80] Following those discussions, on 27 February 2013, in an email copied to all shareholders and their respective attorneys-at-law, Mrs Murray wrote, further advising Mr Tomlinson that "[the Murrays'] offer would expect to include all assets inclusive of retained earnings as indicated in the Balance Sheet with the exception of any interim dividend declared on unaudited profits for this financial period prior to completion". Mr Tomlinson confirmed, in answer to Mrs Murray's enquiry, that all assets and liabilities "would be retained in the companies except for any interim dividend declared on unaudited profits".

[81] On 25 February 2013, the Murrays submitted the offer in the sum of US$1,500,000.00. Later on the same day, Mr Petros submitted to Mr Tomlinson the second offer to purchase the Murrays' shares in the sum of US$1,600,000.00. In Mr Petros' particulars of claim dated 25 June 2013, he averred that his offer was supported by a statement from his bank in North America, which demonstrated that he had funds readily available to complete the purchase.

[82] On the same day, the Murrays again made an offer in the sum of US$1,700,000.00 to Mr Tomlinson. By that offer, the Murrays outlined that payment would be by way of a deposit payment in the sum of US$170,000.00 payable upon the execution of the agreement for sale and that thereafter they would deliver proof of

financing for the sum of US$1,500,000.00 within 14 days of the agreement for sale being executed by both parties. Mrs Murray later confirmed in her affidavit in support of the application for the stay, dated 15 June 2016, that the offer "...made clear that we would require financing for the purchase and indeed from June 2011 we had obtained preliminary approval of a loan in the sum of USD$1,500,000.00 from the National Commercial Bank". On 4 March 2013, the Murrays submitted a further offer in the sum of US$1,750,000.00.

[83] On 5 March 2013, Mrs Messado sent an email to Mr George in the following terms:

> "As you are aware this matter is now the subject of further litigation. We therefore have to place on record that the CHAIRMAN cannot make any decisions regarding offers unless there are clear directions from the court accordingly."

[84] Mr George responded on the same day, copying Mr Tomlinson in these terms:

> "On the contrary. The terms of the agreement between the parties in relation to the offers is [sic] clearly set out in the correspondence (letters and emails), exchanged between the attorneys acting for the parties and Mr. Tomlinson.
>
> It is beyond challenge that:
>
> - The parties agreed to submit offers by 3:30 p.m. on the 25th
> - The Chairman may seek improvement on any of the terms of such offers until close on the 6th
> - At which point the chairman will in his absolute discretion decide which offer is preferable.

> This is clear from correspondence from Jennifer Messado & Co. as well as from Hart Muirhead & Fatta. In fact, the insistence on the 6th being, the cut off date came from the Murrays. [Mr Petros] was prepared to leave it open to [Mr Tomlinson] to decide when he was satisfied he held the best offer obtainable.
>
> Accordingly [Mr Tomlinson], having taken on the task on the above agreed terms, is obliged to choose by no later than close of business tomorrow."

[85] On 6 March 2013, at approximately 4:23 pm, Mr Petros submitted a further offer in the sum of US$1,750,001.00 payable by way of a deposit of 10% being, US$175,000.10 and the balance purchase price payable on or before 30 days of the execution of the agreement for sale. The offer letter also indicated that Mr Petros had to hand all the funds to complete the sale, and did not require loan financing to complete the sale, "with the uncertainties that that involves". The letter further stated that:

> "...It is a condition of this offer that, in the event of its acceptance, for the period between acceptance of this offer and completion of the sale, the Murrays covenant with [Mr Petros] that prior to completion and without the prior written consent of [Mr Petros], [Tensing Pen] shall not (and they shall so procure):
>
> i. incur any expenditure on capital account except in accordance with the budget approved by its board of directors or enter into any commitments so to do;
>
> ii. dispose of or agree to dispose of or grant any option in respect of any part of its assets except in the ordinary course of business;
>
> iii. borrow any money or make any payments out or drawings on its bank account(s) other than in the ordinary course of business;

> iv. enter into any unusual or abnormal contract or commitment or make any loan or enter into any leasing, hire purchase or other agreement or arrangements for payment on deferred terms;
>
> v. **save as is expressly provided for herein, declare, make or pay any dividend or other distribution or do or suffer anything which may render its financial position less favourable than as at the date of this offer**;
>
> vi. grant or issue or agree to grant or issue any mortgages, charges, liens, pledges or other securities for money or redeem or agree to redeem any such securities or give or agree to give any guarantees or indemnities;
>
> vii. create issue or grant any option in respect of any class of share or loan capital or agree so to do;
>
> viii declare or pay any distribution or pay or agree to pay any management fees (save and except where the payment of such management fee is in the ordinary course of business and in accordance with an agreement entered into prior to the date of this offer." (Emphasis added)

[86] In her affidavit of 15 June 2016, at paragraph 19, Mrs Murray confirmed that at approximately 7:07 pm on 6 March 2013, they submitted a revised offer to purchase Mr Petros' shares in the sum of US$1,850,000.00. This offer proposed, so far as is relevant, as follows:

> "...The deposit on the purchase price would be 10% of the purchase price or US$185,000.00 United States Currency with the balance of US$1,665,000.00 United States Currency payable by way of mortgage from either NCB or Capital and Credit Merchant Bank. The mortgage commitment shall be presented within fourteen (14) days of the date of the Agreement of Sale being signed by both parties.

> The completion of the transaction is to be within forty-five (45) days of the date of the Agreement of Sale and same shall be unconditional."

[87] At 7:29 pm, Mr George wrote to Mrs Messado, Kevin Murray and Raymond Clough as follows:

> "The cut-off for offers was close of business today, at your client's behest. You will recall that it was your clients that wanted a finite period for consideration, not [Mr Petros]. Your clients [sic] reworked offer is therefore out of time. In any event, it suffers from the same lack of substance as all your client's previous offers, as the further the offer is from zero, the more reliant it is on financing that does not exist. Mr Tomlinson should pay it no mind and we urge him accordingly."

[88] In an email also on the same date, Mrs Messado responded at 7:33 pm that:

> "We are going to suggest sealed bids within 7 days to the court. Who determines what time is close of business."

[89] By letter sent that same evening to the parties, Mr Tomlinson indicated that as at "the close of business", he had received offers of US$1,750,000.00 (subject to financing) from the Murrays and US$1,750,001.00 from Mr Petros, offering to purchase by way of a cash sale. Accordingly, he indicated his decision to accept the offer made on behalf of Mr Petros it being "the highest and best offer".

[90] Subsequently, on 31 May 2013, Mr Tomlinson resigned as director and chairman of the Board of the companies, with no other directors having been appointed. By her

affidavit of 15 June 2016, at paragraphs 24 to 26, Mrs Murray highlighted that the resignation of Mr Tomlinson was made prior to the payment of dividends, as in her words, "[Mr Petros] made it clear that he will not be authorizing the payment of dividends to the shareholders and since then no dividends interim or final have been paid". She stated further that, "[s]ince the resignation of Mr. Tomlinson in May 2013, the Company has remained in a stalemate. There have been no director's [sic] or shareholders [sic] meetings".

[91] The Murrays, having not complied with the decision of Mr Tomlinson to sell their respective shares to Mr Petros, Mr Petros, on 25 June 2013, commenced a claim in the Supreme Court claiming, among other things:

> "(1) Order for Specific Performance compelling the [Murrays] to execute the Agreement of Purchase and Sale, that reflects the terms of the Agreement as was accepted by Mr. Tomlinson on behalf of the Murrays.
>
> (2) Alternatively, an Order requiring the Registrar of the Supreme Court of Jamaica to sign the Agreement for Sale on behalf of the [Murrays], pursuant to clause 12 of the Schedule.
>
> (3) Further or alternatively, damages for breach of contract in addition to or in lieu of specific performance or at common law.
>
> ..."

[92] Mr Petros, in substantiating his claim, averred at paragraph 17 of his particulars of claim, that he understood the terms of the agreement between himself and the Murrays to be the following:

"(a) Initial offers were to be sent to Mr. Tomlinson by 3:30 p.m. on Monday the 25th February, 2013.

(b) Offers were to remain open for all parties complete with details for the completion.

(c) Offers were to remain open until the close of business on the 6th of March 2013, when they would be closed.

(d) Mr. Tomlinson was to have the sole discretion in deciding which offer to accept.

(e) Each party shall have 24 hours to respond to the bid.

(f) Each party shall get a copy.

(g) Upon the communication of the decision the maker of the better offer will then purchase the shares of the party on the same terms contained in that offer.

(h) Each party was to deposit US$100,000.00 with Mr. Tomlinson as a demonstration of commitment to newly agreed process."

[93] Mr Petros averred that in the light of this, the agreement, as worded, obliged the Murrays to comply with the decision of Mr Tomlinson to sell their shares on the terms accepted by him.

[94] In their defence to Mr Petros' claim, the Murrays averred that:

i) the parties did not agree to the bidding process remaining open until the "close of business" on 6 March 2013 as contended by Mr Petros, but rather that the bidding would remain open until 6 March 2013;

ii) contrary to the assertion by Mr Petros that "the sole discretion in deciding which offer to accept", vested in Mr Tomlinson, he "was to accept the highest offer, or alternatively the highest and best offer, as Independent Director and Chairman of the Board";

iii) Mr Petros' offer of 6 March 2013 in the sum of US$1,750,001.00 included retained dividends, which contravened Mr Tomlinson's directions and the agreement between the parties that "all assets and liabilities would be retained in the companies except for any interim dividend declared on unaudited accounts";

iv) in breach of the agreement between the parties, Mr Petros did not respond to the Murrays' bid of 4 March 2013 within 24 hours, but rather responded "at 4:23 pm on 6th March, in an attempt to prevent [the Murrays] from responding to [his] offer before the close of offers".

v) Mr Tomlinson did not act as an independent director, "but acted in a way that showed bias toward [the Murrays]".

[95] Based on these averments, the Murrays asserted that the purported acceptance of Mr Petros' bid was in breach of the agreement between Mr Petros and them as to the bidding process. As such, Mr Tomlinson's acceptance of Mr Petros' offer is null and void and not binding on them.

[96] The Murrays also filed a claim in which they sought the following reliefs: (a) the appointment of an independent director for the companies; (b) that the sale price of Tensing Pen is lowered by the international hotel brokers as was agreed by the parties and for Tensing Pen to be sold on the open market, pursuant to the original terms of clause 11 of the schedule to the Tomlin Order; (c) alternatively that they be permitted to purchase Mr Petros' shares in the two companies for US$1,850,000.00; and (d) that the decision of Mr Tomlinson as to who was to purchase the shares be set aside.

Batts J's reasons for decision

[97] The four claims that were before the learned trial judge for consideration were all consolidated, by order of the court, for hearing. However, as recounted by the learned trial judge at paragraph [19] of his judgment, on the first morning of the hearing, the respective parties, "agreed that [he] should only resolve the issues pertaining to the claims for Specific Performance … [and] … [i]f it becomes necessary, the other matters will be tried at a later date".

[98] Several witnesses were called by the respective parties notwithstanding, as expressed by the learned trial judge, that the factual issues in the claim were not many. He noted that 'the matter [was] essentially one of construction of documents and [that his] decision for the most part [would] involve mixed issues of law and fact".

[99] Having reviewed the learned trial judge's reasons for his decision, it seems plausible to conclude that having accepted that it was common ground between the parties that there was an agreement between them to vary the terms of the Tomlin

Order for the sale and purchase of the shares, the issues that arose for consideration by him were:

i) what were the terms of that agreement;

ii) whether the terms were sufficiently certain to be enforceable; and

iii) whether Mr Petros was entitled to an order for specific performance.

[100] In resolving the dispute between the parties as to what were the agreed terms of the agreement to vary as well as whether the terms were sufficiently clear to be enforceable, the learned trial judge considered:

i) the email sent to Mr Tomlinson by Mr George on 25 February 2013, as well as those that were sent during the period of 5 and 6 March 2013;

ii) the evidence of the respective attorneys-at-law who were involved in the transaction on behalf of the parties, that is, Mr George and Mrs Messado; and

iii) the evidence of Mr Tomlinson.

[101] One of the principal issues that arose for determination by the learned trial judge, was whether the parties had agreed to the requirement that all bids were to be presented to Mr Tomlinson by the "close of business" on 6 March 2013, and if they did, what was the meaning of the term "close of business".

[102] The email of 25 February 2013, sent by Mr George to Mr Tomlinson referred, among other things, to a discussion between Mrs Messado and Mr George in which it had been agreed that offers would be submitted to Mr Tomlinson "no later than close of business on 6th March 2013". The fact that the email was neither copied to Mrs Messado nor any of the other parties involved in the transaction was a source of dispute at the trial. The learned trial judge, however, found this omission to be "an oversight" as he stated that the contents of the email "[did] not, apart from the reference to "close of business", depart significantly from those outlined in Mrs. Messado's two emails". He concluded that the failure of Mr George to send the emails to the other parties was consistent with the "surprisingly cavalier approach to the transaction". In considering the totality of Mr George's evidence with respect to the email, the learned trial judge found him to be a "truthful witness" and his recollection of the conversation with Mrs Messado as accurate.

[103] The learned trial judge considered the email exchanges between Mr George and Mrs Messado over the period 5 to 6 March 2013. He noted that in Mr George's email to Mrs Messado, he referred specifically to the fact that Mr Tomlinson, "[was] obliged to choose by no later than close of business". The learned trial judge highlighted that Mrs Messado in her response to this email, made no objection to this reference. At paragraph [31] of the judgment, the learned trial judge stated that:

> "[31]...Mrs. Messado's concern manifestly, was that her bid of the 6th March at 7:07 p.m. be considered. She did not deny that 'close of business' had been agreed. It is somewhat strange that she did not deny it even after receiving the email from Mr. George of 5th March at 5:30

> p.m. which referred to 'close' and 'close of business' in two separate parts of the email. Had there been no such term agreed I would have expected a clear explicit and prompt rebuttal from Mrs. Messado."

[104] As it relates to the meaning of the term "close of business" the learned trial judge accepted the evidence of Mr Tomlinson and Mr George. He concluded at paragraph [32] that the phrase is well known and often used in commercial dealings. It references, he said, the normal end of the workday. He concluded that in this case, the evidence suggested, "anytime from 4:30 to 5:00 pm".

[105] In considering the evidence of the respective attorneys-at-law in coming to his conclusion as to whether the term, "close of business", was agreed between the parties, the learned trial judge accepted Mr George as a truthful witness, "more focussed and earnest". Comparatively, he found the evidence of Mrs Messado to be, "imprecise and at times rather flippant" and "less than candid as it related to the deadline of 6th March 2013". The learned trial judge further observed:

> "[28] This effort by Mrs. Messado to leave the gateway open for bids even after the 6th March, 2013 does her no credit. It was clear from all the documentation and the evidence thus far that no bids were to be accepted after the 6th March, 2013. The intention of both sides was to have a period for bidding and counter bidding after which the decision would be made by Mr. Ken Tomlinson as to which bid to accept. The issue is whether the period was to end at the 'close of business', on the 6th March or twelve midnight on the 6th March. Both emails, Mr. George's and Mrs. Messado's, are clear, that no further bids were to be accepted after the 6th March."

[106] Further, the learned trial judge rejected the evidence of Mrs Messado that the bids were to be open for a 24-hour period to respond to the bid of the other. In this regard, the learned trial judge continued:

> "[34]...[I]t is clear, even from Mrs. Messado's email of the 25th February 2013 at 12:19 p.m. that the 24 hours did not extend beyond the 6th March 2013. That same email said, 'Bids to remain open at the discretion of the Board Chairman on the understanding that the time for presentation will not exceed the 6th March 2013 when they will be closed.' This is reaffirmed by a later statement in that email that 'the best and final offers must be in by March 6th 2013.' If each party had 24 hours to respond to every bid submitted, including the 'best and final offer,' then not only would that offer not be final but the 6th March 2013 would not be the date bids 'closed.' As Mr. Tomlinson indicated in his evidence the process might be never ending and that is why commercial men in a bidding process almost always have a final cut off date. I find there was no agreement for a 24 hour or any period extending beyond the 6th March 2013, for the purpose of renewed offers. The agreement rather, was for initial bids to be in by the 25th February, 2013. Between then and close of business on the 6th March 2013 Mr. Tomlinson was at liberty to consider improved offers or counter bids. Thereafter he was to decide which offer was the best."

[107] Having considered all these issues, the learned trial judge, at paragraph [33] of his reasons for judgment, set out the terms agreed between the parties to be the following:

> "1) Each party would send a deposit of US$100,000 to Mr. Ken Tomlinson.
>
> 2) Each would submit detailed offers to Mr. Tomlinson by 3:30 p.m. on the 25th February, 2013.
>
> 3) Mr. Tomlinson was then free to discuss each offer with the respective parties with a view to clarification or

> improvement of their offers. This process was to end by close of business on the 6th March, 2013.
>
> 4) Mr. Tomlinson in his complete discretion would decide which offer was the best. The decision which bid was to be accepted was to be solely that of Mr Ken Tomlinson."

[108] In accepting Mr Tomlinson's evidence as to the reason he considered a cash offer superior to an offer, subject to financing, the learned trial judge observed at paragraph [38] of his judgment that Mr Tomlinson had "clearly articulated to the Murrays his concern that their offer was not for cash...". He referenced, by way of an example, Mr Tomlinson's email of 26 February 2013.

[109] The learned trial judge also accepted Mr Tomlinson's evidence as to the proper construction of the condition of Mr Petros' final offer relating to the non-payment by Tensing Pen of dividends or distributions. The learned trial judge noted that he accepted that only a payment of dividends, which affected the viability of the company, was prohibited. As a consequence, he found as a matter of fact, that the payment "of a US$60,000.00 dividend would not render the company's financial position less favourable within the meaning of the condition."

[110] In relation to the issue of Mr Tomlinson's consideration of Mr Petros' second offer, before accepting it, the learned trial judge said this:

> "[39] Finally, Mr Tomlinson's admission, that at the time he made his decision he had not yet read [Mr Petros'] second offer, is of no great moment. The evidence is that by the time he put pen to paper to advise the parties of his decision he had seen the offer. Furthermore, in his opinion, its terms do not affect the comparative superiority of the offer. This is because, on his reading of the conditions only a payment of

> dividends which affected the viability of the company was prohibited..."

[111] At paragraphs [42]-[44] of his reasons for judgment, the learned trial judge recounted the reasons given by the Murrays for contending that an order for specific performance ought not to be granted. The learned trial judge, however, stated with respect to this, that he accepted that it was within the remit of Mr Tomlinson to accept the offer, which he considered to be the best. Accordingly, by Mr Tomlinson indicating that he considered Mr Petros' offer to be the best, the Murrays became bound to honour the agreement. He put it this way:

> "[45] On the other hand I do believe an estoppel arises. This is because it was within the remit of Mr. Tomlinson to 'accept' the best offer. His decision as to which offer was best binds the Defendants. They thereby became bound to honour the agreement. It has not been demonstrated that the conditions at (i) to (viii) are unusual or in any way unfair. Indeed they appear to be that which any well drafted contract of this type could reasonably contain. Had he accepted an offer without that term any effort by the vendor to depreciate the asset in the manner stated would in all likelihood be a breach of an implied good faith term. The purpose is to ensure that in between contract and completion nothing is done to undermine the value of the assets being sold. The fact that it is reasonable to include such provisions is demonstrable by reference to the conditions contained in the bank's offer of financing, because the terms are similar (although not identical) and serve a similar purpose. Mr. Tomlinson in accepting the offer has not therefore gone outside his remit and the Defendants are in consequence bound thereby. They are for that reason estopped or precluded from refusing to covenant accordingly. I so hold. I repeat for emphasis that, as found at paragraph 41 above, the covenant at (v) only precludes the payment of a dividend to the extent it renders the company's 'financial position less favourable than as at the date of this offer.'

> [46] I find that Mr. Tomlinson's answers in cross-examination (outlined at paragraph 42 above) reflect his ignorance of the full legal implications of his mandate. The terms were reasonable and only to be expected in a contract of this nature. I find that whether he knew it or not, Mr. Tomlinson was, as agent of the parties, entitled to bind them to any reasonable term. This must be so or else their power to accept the best and final bid would really be rendered nugatory. This is because every contract has terms in addition to the purchase price. To subject the parties to a process of negotiation of those terms, after the best offer was accepted by Mr. Tomlinson, would empower the losing bidder to derail the entire process by taking unreasonable objection to otherwise reasonable terms. This indeed may be the thinking behind the decision of the parties to empower Mr. Tomlinson to accept not just the best price' but the 'best offer.'
>
> [47] In the final analysis I hold that Mr. Ken Tomlinson having accepted the Claimants offer as the best, bound the Defendants to honour all the terms of that offer including the giving of the covenant's stipulated. The conditions were therefore not conditions precedent in the classical sense. The word condition in the offer letter was used to denote the import of the term of the contract. In other words acceptance indicated that the vendors covenanted (and procured) the items at (i) to (viii) ...."

[112] On the basis of the foregoing reasoning and findings, the learned trial judge found that Mr Petros was entitled to the order for specific performance that he sought.

The grounds of appeal

[113] Dissatisfied with the learned trial judge's decision, the Murrays filed 14 grounds of appeal. In them, they sought to challenge various findings of fact and three findings of law of the learned trial judge. The grounds read:

"1. The Learned Judge erred in finding that the parties had agreed to submit bids by 'close of business' on 6th March, 2013. The pattern of communication between the parties was that there were discussions between the Attorneys, which said discussions were ratified by the [Murrays] and [Mr Petros] respectively by way of email correspondence copied to them. The Learned Judge found as a fact that in error [Mr Petros'] Attorney had failed to copy the other party with the agreed instructions, and in such circumstances, even though agreed between the Attorneys, the term of the agreement to the effect that bids were to be delivered by close of business on 6th March was never communicated to, ratified nor agreed to by the [Murrays]. In the premises the Learned Judge erred in finding that it was a term of the agreement between the parties that the parties were to submit bids by 'close of business' on 6th March, 2013.

2. Specific Performance being an equitable remedy the Learned Judge erred in that having found as a fact that [Mr Petros'] Attorney-at-law, as agent of [Mr Petros], had in error failed to copy the other side with the agreed instructions, he should not have granted specific performance of an agreement founded on [Mr Petros'] error.

3. The learned Judge erred in granting specific performance because the agreement between the parties was unclear and equivocal especially having regard to the issue of the payment of dividends and the provision that each party shall have 24 hours to respond to the bid and specific performance is not appropriate in such circumstances

4. In his judgment (para 38) the Learned Judge found that Mr. Tomlinson had 'clearly articulated to the Murrays his concern that their offer was not for cash['] see for example his email of the 26th February, 2013 (p 103 Agreed Bundle). The email of 26th February, 2013 does not reflect a communication of concern of Mr. Tomlinson that their offer was not for cash. In fact there is no evidence that Mr. Tomlinson at any time indicated to [the Murrays] that he considered a cash offer to be superior to an offer that was financed. All offers submitted by the [Murrays] were subject to financing, and all offers submitted by [Mr Petros] were cash offers. In the circumstances unknown to them the [Murrays] were engaged in a bidding process where from the inception they had no chance of success. Such a process

is unfair and inequitable, and the learned Judge erred in granting specific performance in such circumstances.

5. The learned Judge erred in granting specific performance of the offer of [Mr Petros] dated 6th March, 2013 in view of the admission by Mr. Tomlinson that he had not read the offer, and also in view of the further evidence of Mr. Tomlinson that he thought that 'based on what is outlined here (in the offer of 6th March) there is a probability the offer would fail in respect of the conditionalities'.

6. The Learned Judge erred in finding as a fact, that the payment of a US$60,000 dividend would not render the company's financial position less favourable within the meaning of the condition.

7. The learned Judge erred in finding that the conditions stated in the offer letter from [Mr Petros] dated the 6th of March were not conditions precedent in the classical sense and that the offer was not a conditional one.

8. The Learned Judge erred in finding that the offer of 6th March 2013 was not a conditional offer and was enforceable.

9. The Learned Judge erred in holding that Mr. Ken Tomlinson having accepted [Mr Petros'] offer as the best, bound the [Murrays] to honour all the terms of that offer including the giving of the covenants stipulated therein, which covenants were not put to the [Murrays] for their express consent and agreement before the offer was accepted by Mr Tomlinson and especially having regard to the previous discussions between the parties regarding the payments of dividends.

10. The Learned Judge erred in finding that an estoppel arose against the [Murrays] since no estoppel was pleaded in the statement of case or proven at the trial.

11. The Learned Judge erred in declaring that on a true construction, the terms of the offer dated 6th March 2013 do not preclude the payment of dividends for the year ending 30th June, 2013 since such a declaration was in vain.

12. The Learned Judge erred in granting specific performance of the offer of 6th March, since based on the said Order the [Murrays] would be deprived of the payment

of dividends for the period between the making of the offer and completion, which dividends they legitimately expected to receive based on the agreement between the parties as communicated by Mr. Tomlinson as agent for both parties. The implementation of the Order of the Court would therefore be unfair to the [Murrays], and as such Specific Performance is inappropriate as a remedy.

13. The Learned Judge erred in granting specific performance of [Mr Petros'] offer of 6th March, 2013 in that as agent for both parties Mr. Ken Tomlinson had by emails directed the parties to submit offers to include all assets inclusive of retained earnings as indicated in the balance sheet with the exception of any interim dividend declared on unaudited profits for this financial period **prior to completion.** Further Mr. Tomlinson had by email dated 21st February, indicated to both parties that all shareholders would be entitled to some form of dividend based on profits of the company, **as at the date of transfer**. The [Murrays] had adhered to this Direction and made their offer accordingly. [Mr Petros] did not comply with the direction. In the circumstances it would be unfair and inequitable to the [Murrays] that [Mr Petros'] offer submitted in breach of the directive of Mr. Tomlinson be enforced by way of specific performance.

14. In the circumstances of this case, the Learned Judge erred in finding that the conditions set out in the offer of [Mr Petros] were reasonable and only to be expected in a contract of this nature." (Emphases as in the original)

[114] During the course of her oral submissions, Miss Davis sought leave to add a further ground of appeal being:

"15. The learned trial judge erred in saying that close of business was between 4:30 p.m. and 5.00 p.m."

The application for stay of execution

[115] Based on these grounds of appeal, Miss Davis contended that the case is one which is fit for a stay of execution to be granted, pending the determination of the issues on appeal. Reliance was placed on the affidavit sworn to and filed in support of the application by Mrs Murray on 15 June 2016.

[116] The application was opposed by Mr Petros, whose evidence in response to the application was provided through the affidavit of Mr George, filed on 6 July 2016.

[117] In **Linotype-Hell Finance Limited v Baker** [1992] 4 All ER 887, Lord Justice Staughton laid down the principles which were applicable for a stay to be granted as follows:

> "...[I]f a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution."

[118] However, the current standard of assessment by which the court operates was later expounded in **Combi (Singapore) Pte Limited v Ramnath Sriram and Sun Limited** [1997] EWCA 2164, by Phillips LJ who, while approving the traditional principle laid down in **Linotype-Hell Finance Limited v Baker**, sought to add a new perspective to the approach that should be adopted. His Lordship directed that, once it is established that there is some merit in the appeal, the proper approach must be to make that order which best accords with the interests of justice. From Phillips LJ's explanation of this approach, the following principles have been extracted and outlined:

i) If there is a risk that irremediable harm may be caused to the respondent if a stay is granted, but there is no similar detriment to the applicant if it is not, then a stay should not normally be ordered.

ii) If there is a risk that irremediable harm may be caused to the applicant if a stay is not ordered but no similar detriment to the respondent if a stay is ordered, then a stay should normally be ordered.

iii) If the court concludes that there is no merit in the appeal, then no stay of execution should be ordered.

iv) Where the court concludes that there is a risk of harm to one party or another, whichever order is made, the court should balance the alternatives in order to decide which of them is less likely to produce injustice.

v) The starting must be that the normal rule is that there is no stay but where the justice of that approach is in doubt, the answer may well depend upon the perceived strength of the appeal.

[119] Later, in **Hammond Suddard Solicitors v Agrichem International Holdings Limited** [2001] EWCA Civ 2065, Clarke LJ restated this approach that the essential question is whether there is a risk of injustice to one or other or both parties, if the court were to grant or refuse a stay.

[120] The approach from the foregoing authorities has been adopted and engaged by this court in several cases to include, **Cable & Wireless Jamaica Ltd (T/A Lime) v Digicel (Jamaica) Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 148/2009, judgment delivered 16 December 2009; **William Clarke v Gwenetta Clarke** [2012] JMCA App 2; and **Egerton Chang and Margaret Chang v Supreme Ventures Limited** [2014] JMCA App 24, all cited by the parties. Counsel in this case have also embraced this revised approach to the question of whether a stay should be granted pending appeal.

[121] It is, therefore, clear that the court, in assessing whether to grant a stay, must first examine whether the appeal has some prospect of success.

Prospect of success

[122] It was the contention of Miss Davis that the appeal is not without merit and that it is in the interests of justice that a stay be granted. She highlighted several crucial aspects of the reasoning and decision of the learned trial judge in urging the court to find that on those grounds, the appeal has some prospect of success.

[123] Queen's Counsel Mr Small countered that there was no merit in the grounds of appeal to warrant interference from this court. He noted that many of the grounds of appeal were "anchored" within the learned trial judge's findings of fact and so, the court ought to be guided by dicta of this court in **Winston Edwards v Gerald Stevenson and Howard Stevenson** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 57/2004, judgment delivered 16 November 2007 in

which Harrison P, having cited the oft-quoted **Watt (or Thomas) v Watt** [1947] AC 484, stated at page 4 of the judgment:

> "Findings of fact are essentially the province of the trial judge. Consequently, an appellate court will be slow to interfere with such findings unless the trial judge was plainly wrong. This approach has consistently been adverted to and followed by this Court."

[124] In considering the application and the submissions of the parties, I was quite mindful of the fact that this is an application for stay of execution, pending the hearing of the appeal and not the hearing of the appeal itself. I, therefore, cautioned myself that the court was not required at this stage to express its opinion, in great detail, regarding the merits of the different positions taken by the respective parties as these issues will be properly ventilated at the appeal. However, to the extent that the test is whether the appeal has some chance of succeeding, it was taken that the court was obliged to assess the merits of the grounds and to form a provisional view of the likelihood of their success (or any of them) on appeal.

[125] I formed the view that there were, in the main, five broad (albeit overlapping) issues emanating from the (equally overlapping) grounds of appeal to be examined. They have been conveniently identified and grouped as follows:

i) whether the learned trial judge erred in his findings concerning the agreement between the parties and the meaning of the term "close of business" (grounds one and 15);

ii) whether the learned trial judge erred in granting specific performance, having regard to certain specified circumstances (grounds two, three, four, five, six, 11, 12, and 13);

iii) whether the learned trial judge erred in his findings concerning the meaning and effect of the conditions stated in Mr Petros' offer of 6 March 2013, and the enforceability of the offer (grounds seven, eight, nine and 14); and

iv) whether the learned trial judge erred in finding that an estoppel arose against the Murrays in the absence of such pleadings (ground 10).

Issue (i)

Whether the learned trial judge erred in his findings concerning the agreement between the parties and the meaning of the term "close of business" (grounds one and 15)

[126] The Murrays' primary grouse with respect to the learned trial judge's treatment of the term "close of business" is that he erred in finding that the term was agreed between the parties as marking the cut-off time for bids to be submitted. Connected to this issue, is the Murrays' discontentment with the learned trial judge's finding that Mr George's failure to copy all the parties to the email that he sent to Mr Tomlinson in which the term was utilised was an oversight and an error.

[127] They complained that the learned trial judge erred in his assessment of the correspondence between the parties, particularly, the email from Mrs Messado, which

was copied to all parties as well as the email from Mr George to Mr Tomlinson, which was not copied to them or their attorneys-at-law. They contended that the pattern of correspondence between the parties demonstrated that all emails would have been copied to both sides and that this pattern was the means by which attorneys-at-law communicated to each other and ratified terms agreed between them.

[128] The Murrays also contended that the learned trial judge erred in holding that the term "close of business", in this case, was anywhere between 4:30 and 5:00 pm. Relying on the case, **Electron Holdings Limited and another v Halpin and another** [2013] IEHC 495, Miss Davis argued that the learned trial judge did not properly construe the term in the context of the matter at hand and did not take into account the actual conduct of the parties in determining what close of business was. The businesses in question, she said, was the hotel business (Tensing Pen), which is open during the night as well as the the attorneys' business and that of Mr Tomlinson. She maintained that the evidence showed that even on the day in question, the parties were doing business well beyond 5:00 pm. According to Miss Davis, Mr Tomlinson had received the Murrays' offer, which was much higher than Mr Petros' offer, while he was doing business.

[129] In response, Queen's Counsel Mr Small contended that the learned trial judge's finding that the offer process was to end by close of business on 6 March 2013, was predicated on his observation of the truthfulness of the witnesses, based not only on his assessment of questions and answers, but also patterns of behaviour and the witnesses' demeanour when giving their evidence.

[130] Queen's Counsel also submitted that completely independent of the email sent by Mr George to Mr Tomlinson, which was not copied to Mrs Messado, the learned trial judge found that, except for the omission of the term "close of business", the contents of the email reflected the terms of the agreement between the parties. Queen's Counsel contended that the learned trial judge found, as a matter of fact, that all parties were aware of terms of the agreement. These matters, he argued, are findings of facts, which the appeal court is not at liberty to disturb because the learned trial judge was not plainly wrong in arriving at them.

Discussion

[131] The learned trial judge considered in appreciable detail the evidence with respect to the bidding process that had been agreed between the parties. In coming to his conclusion, the learned trial judge detailed, with much clarity, not only the documentary evidence on which he relied but also his assessment of the truthfulness and reliability of the oral evidence that each witness gave.

[132] At paragraphs [28] to [34] of his reasons for judgment, the learned trial judge reviewed the evidence with respect to this aspect of the proceedings and stated conclusively that he accepted the evidence of Mr George that the term was agreed on by him and Mrs Messado as the cut-off point for bids on 6 March 2013. He accepted Mr Tomlinson's evidence as to the meaning of the phrase. He accepted the evidence that the phrase is well known and often used in commercial dealings. It references, he said, the normal end of the workday. In this case, he concluded that the evidence suggested any time from 4:30 to 5:00 pm. The learned trial judge indicated further that he

accepted Mr Tomlinson's evidence that if a term for the closure of bids was not agreed and that the bidding process was to have remained open for 24-hours, as proffered by the Murrays, the process would be "never ending".

[133] It seemed to me that the learned trial judge, having considered all the matters which were relevant to his determination of the issue concerning the term "close of business", there is nothing on the evidence which would lead this court to disturb his findings on that matter. I concluded that it would be difficult for the Murrays to successfully argue on appeal that the learned trial judge was plainly wrong in coming to his findings as to what the term "close of business" meant and that it was agreed between the parties that it would represent the cut-off mark for the close of bids. It is higly unlikely that the court would find merit in the grounds treating with this issue.

Issue (ii)

whether the learned trial judge erred in granting specific performance having regard to certain specified circumstances (grounds two, three, four, five, six, 11, 12, and 13)

[134] In contending that specific performance ought not to have been granted, and, so, the learned trial judge erred in doing so, the Murrays cited specific matters (some of which overlap with the complaint on other grounds) as having the effect of rendering the order inappropriate and wrong . These matters in broad outline were:

i) The failure of Mr George, as agent for Mr Petros, to copy the other side with the agreed instructions in his email to Mr Tomlinson on 25 February 2013 (ground two).

ii) The conditions in Mr Petros' offer and the position of the parties regarding the payment of dividends as well as the provision that each party should have 24-hours to respond to the bid (grounds three, six, 11, 12 and 13).

iii) The acceptance of cash purchase by Mr Tomlinson as the best offer, when he did not, at any time, indicate to the Murrays that he considered a cash offer to be superior to an offer that was financed (ground four).

iv) The admission by Mr Tomlinson that he had not read the new offer of Mr Petros, and his evidence that based on what was outlined in the offer of 6 March 2013, there was a probability that the offer would fail in respect of the conditionalities (ground five).

v) The order is unfair as it would deprive the Murrays of the payment of dividends for the period between the making of the order and completion, which they legitimately expected to receive based on the agreement between the parties as communicated by Mr Tomlinson as agent for both parties (ground 12).

vi) The Murrays had adhered to the directions of Mr Tomlinson that all shareholders would be entitled to some form of dividend based on profits of the company as at the date of transfer and had made

their offer accordingly. Mr Petros, on the other hand, did not comply with the direction (ground 13).

[135] In treating with this aspect of the Murrays' case on appeal, I have highlighted the main areas under the various headings for specific focus, before generally disposing of the issue regarding the grant of specific performance.

A. *failure of Mr George to copy the Murrays on the email sent to Mr Tomlinson*

[136] The learned trial judge, having considered the arguments of the Murrays concerning the failure of Mr George to copy them on the correspondence with Mr Tomlinson in the email of 25 February 2013, in which he made reference to the term "close of business", found that it was an oversight and an error on the part of Mr George. He did not, however, find that the error was of such gravity as to affect what he found to have been the agreement between the parties regarding the cut-off time for the close of bids.

[137] The learned trial judge assessed the evidence (including documentary evidence) as well as the credibility of the witnesses whose evidence was in dispute to make his determination. He concluded, as a matter of fact, that Mr George's evidence was more believable than that of Mrs Messado and on that basis found that there was an agreement that the cut-off time for the bids was at the close of business on 6 March 2013.

[138] It is very difficult to discern a proper basis on which the Murrays could successfully establish on appeal that the learned trial judge was plainly wrong in the

manner he treated with Mr George's omission to copy Mrs Messado on the email, in arriving at his conclusion that Mr Petros was entitled to an order for specific performance.

B. *whether specific performance was inappropriate because the agreement between the parties was unclear and equivocal, especially with regards to the payment of dividend and the provision that each party had 24-hours to respond*

(i) the 24-hour timeline

[139] I chose to start with the arguments concerning the 24-hour timeline because of its connection with the "close of business" issue just disposed of. I concluded after an assessment of the evidence and the learned trial judge's findings that the Murrays will have an uphill task in their effort to convince the court at the hearing of the appeal that the learned trial judge was plainly wrong in rejecting Mrs Messado's evidence on this issue of the 24-hour timeline for response. The learned trial judge's construction of the agreement, which coincided with that of Mr Tomlinson that the close of bids was by "the close of business", meaning, 4:30 - 5:00 pm on 6 March 2013, and that there was no agreement for any time afforded to the parties beyond that, amounted to a clear finding of fact.

[140] In the absence of any basis established by the Murrays on which the court could find that the learned trial judge was wrong in his interpretation of this provision in the agreement, I could not foresee this court disturbing the order for specific performance on this ground.

[141] The argument that the learned trial judge erred in allowing oral evidence to contradict the written agreement is, equally, not likely to avail the Murrays on their appeal. This is in the light of the evidence from Mrs Messado that she had discussions with Mr George, some oral and some in writing, and that the email which she sent on 25 February 2015, purportedly setting out the terms of the agreement, did not contain all the terms agreed between them.

[142] In the circumstances, it cannot be said conclusively that the parties were proceeding on the premise that all the terms agreed were reduced to writing in the exchange of emails. It means that the parol evidence rule that the Murrays sought to invoke would not be applicable in the circumstances for the court to hold that the learned trial judge erred in fact and/or law. This challenge to the learned trial judge's decision to grant specific performance on this basis seem unlikely to succeed.

(ii) payment of dividends

[143] In relation to the payment of dividends and Mr Petros' offer with the conditions concerning it, the Murrays' attack on the learned trial judge's decision is multi-fold. They maintained that the conditions in Mr Petros' offer and the position of the parties regarding the payment of dividend, also served to render the agreement between the parties unclear and equivocal. They contended that it was expressly agreed between the parties that the offers would not include retained dividends.

[144] They maintained also that the implementation of the order for specific performance would be unfair as it would deprive them of the payment of dividends for

the period between the making of the order and completion, which they legitimately expected to receive based on the agreement between the parties as communicated by Mr Tomlinson as agent for both parties. According to the Murrays, it would be unfair and inequitable to them that Mr Petros' offer was submitted in breach of Mr Tomlinson's directives but be enforced by way of specific performance, while they had adhered to those directives and yet be deprived of those dividends.

[145] Miss Davis maintained that the learned trial judge erred when he found that a payment of dividends of US$60,000.00 would not have had an unfavourable impact on the financial status of the company. According to learned counsel, it is a matter of ordinary common sense that a payment of US$60,000.00 would, obviously, make a company's financial position less favourable. Additionally, she said, there was no evidence that the interim dividend of US$60,000.00 was agreed. Counsel, therefore, concluded that the learned trial judge would have erred as there were no accounts before the court from which he could have made a determination as to what, if any, dividend would have been payable.

[146] Mr Small submitted that, contrary to the arguments raised by the Murrays, the learned trial judge was not in error in granting specific performance as there was nothing unclear and equivocal about the terms of the agreement between the parties as it related to the payment of dividends.

[147] He argued further that the finding that the payment of US$60,000.00 dividends would not render the company's financial position less favourable within the meaning of

the condition was one of fact, based on Mr Tomlinson's evidence, a witness with much experience in corporate affairs. It was this finding of fact, he said, that led the learned trial judge to make the declaration that, on its true construction, the terms of the offer of 6 March 2013, would not preclude the payment of dividends for the year ending 30 June 2013. This finding by the learned trial judge also meant, he said, that dividends could be paid, if declared by the directors, for the period between the making of the offer and completion. Queen's Counsel, therefore, contended that these findings of fact were not open to disturbance by the appellate court.

[148] I accepted the submissions of Mr Small on this point. The findings of the learned trial judge in relation to the offer of Mr Petros, concerning the payment of dividends, and the effect that the payment of US$60,000.00 may have had on the financial position of the company, were deeply rooted in the evaluation of facts and the acceptance of Mr Tomlinson as a credible and reliable witness. All these were matters of fact, which were, ultimately, for the learned trial judge to determine, as the sole tribunal of fact.

[149] There is no manifest error in the learned trial judge's treatment of these issues and his findings in relation to them that would, in my view, lead an appellate court to conclude that his ultimate findings that there was an enforceable contract between the parties has been undermined.

[150] No real chance of success could be discerned in relation to these aspects of the Murray's complaint, which seek to impugn the order for specific performance.

C. *Whether Mr Tomlinson had indicated to the Murrays his preference for a cash offer*

[151] The learned trial judge found that Mr Tomlinson had "clearly articulated" to the Murrays his concern that their offer was not for cash. The Murrays contended that the email to which the learned trial judge had referred in coming to this conclusion does not reflect that communication. They said he erred in so finding. They maintained that with Mr Tomlinson having a preference for a cash offer, they were, in circumstances unknown to them, engaged in a bidding process where, from the start, they had no chance of success.

[152] Even without undertaking any detailed analysis of this argument, and taking the Murrays' contention as correct that the learned trial judge erred in saying that Mr Tomlinson had indicated to them his preference for a cash bid, thus placing them in the best possible position in advancing this ground, it is, indeed, clear that they are not likely to succeed on it. This is so, because, even if Mr Tomlinson had not conveyed his opinion or preference to them, he was accepted by the learned trial judge (rightly so in my view) as the sole person with the absolute discretion to accept the highest and best offer, on behalf of the parties. It follows, then, that if he believed that a cash offer was best in the circumstances, that was a matter for him, and for him only, to decide.

[153] Prior consultation with the parties as to what he would accept as the highest and best bid was never made a pre-requisite for the exercise of this discretion. Indeed, there is no evidence that Mr Petros was advised by Mr Tomlinson that cash was preferred and, therefore, had made his offer based on that information which was not

shared with the Murrays. Both parties evidently, made the offer that they, in their own judgment, considered to be the highest and the best. From the very start, the Murrays made an offer that was dependent on financing and did so even after noting the first cash offer of Mr Petros. There would, therefore, be nothing to justify the allegation of unfairness in the bidding process that would affect the remedy granted by the learned trial judge.

[154] It would be difficult, in my view, for the Murrays to persuade a court that Mr Tomlinson had no right or authority to prefer a cash offer to one dependent on financing, given the mandate he was given. This ground is not sufficiently meritorious to guarantee the Murrays success on appeal.

D. *The effect of Mr Tomlinson's admission that he had not read Mr Petros' further offer of 6 March 2013*

[155] The Murrays' contention is that specific performance is rendered inappropriate because of Mr Tomlinson's admission that at the time of making his final decision with respect to the bids, he had not read Mr Petros' final offer and that, there is a probability the offer would have failed because of the conditionalities. Miss Davis contended that Mr Tomlinson "totally failed" in his duties to the parties because he failed to consider the offer of Mr Petros, including the conditions. Miss Davis argued that he was required to accept the highest and best offer and for that purpose, he was obliged to consider all the offers before him. According to her, he could not properly have considered the offers if he had not read Mr Petros' second offer.

[156] The learned trial judge did not attach any weight to the admission of Mr Tomlinson because of his analysis of all the evidence, including Mr Tomlinson's emails to the parties advising them of the acceptance of the bid. The learned trial judge found what Mr Tomlinson said to have been of "no great moment" because as he put it, "[t]he evidence is that by the time he put pen to paper to advise the parties of his decision he had seen the offer". There is, indeed, evidence that shows that Mr Tomlinson, in writing to the parties on 6 March 2013, had indicated the offer made by Mr Petros, which he accepted. For him to have written the specific figure stated by Mr Petros in his offer and indicating that it was a cash offer, was what apparently led the learned trial judge to infer that he must have seen the offer by the time he reduced his acceptance to writing.

[157] The question that would have arisen is this: if Mr Tomlinson had not read the offer before writing to the parties indicating his acceptance, how then was he able to state the sum of the offer when he indicated his acceptance in writing on 6 March 2013? There was no investigation of that question. In the circumstances, the question for an appellate court could well be whether such an inference that Mr Tomlinson would have seen the offer by the time he put pen to paper to communicate his acceptance was reasonably open to the learned trial judge in the light of Mr Tomlinson's clear evidence that he had not read the offer before accepting it.

[158] The Murrays could well have an arguable case that the learned trial judge erred in his conclusion on this issue, in the absence of an explanation coming from Mr Tomlinson clarifying his evidence and the letter he wrote to the parties accepting the

offer. But this may not take them very far in impugning the order for specific performance because of other evidence that was before the learned trial judge, and which he accepted to find that the offer was properly made and accepted.

[159] The learned trial judge had gone further to state that he accepted the evidence of Mr Tomlinson that in his opinion, the terms did not affect "the comparative superiority of the offer". Mr Tomlinson's evidence, as the learned trial judge noted, was that he formed the view upon his construction of the offer that only a payment of dividends, which affected the viability of the company, was prohibited. Mr Tomlinson opined that the payment of US$60,000.00 would not have rendered the company's financial position less favourable within the meaning of the condition. The learned trial judge accepted that construction of the offer by Mr Tomlinson and the opinion he gave regarding the payment of dividends.

[160] The grant of the order for specific performance was based on facts that the learned trial judge accepted to have been proved to his satisfaction. He arrived at findings of fact, regarding the offer that he was at liberty to make on the evidence before him. It would be difficult for the Murrays to demonstrate that he was plainly wrong to accept Mr Tomlinson's evidence on the construction and effect of Mr Petros' offer.

[161] The core finding of the learned trial judge in granting specific performance was that it was within the remit of Mr Tomlinson to accept the highest and best offer and he had not gone outside his remit in accepting Mr Petros' offer, which contained the

conditions. Therefore, the learned trial judge concluded that Mr Tomlinson's decision, as to which offer was best, was sufficient and effective in law to bind the Murrays. On that basis, he found that the Murrays were bound to honour the agreement as Mr Tomlinson had done what he was appointed to do as their duly appointed agent. He also opined that the conditions themselves were not unusual, unreasonable or unfair and were, "only to be expected in a contract of this nature".

[162] These were all findings of fact of the learned trial judge, which, in my view, are not likely to be interfered with by this court on the hearing of the appeal, given the standard of review that the court is obliged to employ. The Murrays' complaint that the learned trial judge erred in granting specific performance, in the face of Mr Tomlinson's admission that he had not read Mr Petros' final offer, has no prospect of success.

[163] I concluded, generally, in relation to the relevant grounds of appeal under consideration, that the Murrays' chance of success in establishing that the learned trial judge was plainly wrong in granting specific performance on the bases discussed above, seemed more fanciful than real.

Issue (iii)

Whether the learned trial judge erred in his findings concerning the meaning and effect of the conditions stated in Mr Petros' offer of 6 March 2013 and the enforceability of the offer (grounds seven, eight, nine and 14)

[164] Miss Davis contended that correspondence between Mr Tomlinson and the parties, prior to the commencement of the bidding process, confirmed that he had agreed that the bids were not to include terms relating to interim dividends. These

correspondence, counsel contended, restricted Mr Tomlinson who was acting as an agent, as to what bids he could have accepted.

[165] Furthermore, the Murrays maintained, as expressed in ground nine, that Mr Petros' offer, having included the relevant covenants, would have required that the conditions should have first been put to them, "for their express consent and agreement" before the bid was accepted by Mr Tomlinson. Counsel, on their behalf, submitted that it is established law that an agent is not empowered to act beyond the authority of his principal. For these arguments, she placed reliance on an excerpt from Halsbury's Laws of England, 4th edition, Volume 1, paragraph 820, which reads as follows:

> "Where an act done by an agent is not within the scope of the agent's express or implied authority, or falls outside the apparent scope of his authority, the principal is not bound by, or liable for, that act, even if the opportunity to do it arose out of the agency, and it was purported to be done on his behalf, unless he expressly adopted it by taking the benefit of it or otherwise."

[166] The Murrays also complained that the learned trial judge erred when he found that the conditions stated in the offer were not conditions precedent in the classical sense and that the offer was not a conditional offer and, therefore, enforceable.

[167] Mr Small, in response to these arguments, pointed out that the terms of Mr Petros' offer letter clearly highlighted that the conditions would only become operative upon acceptance of the offer. He pointed to the specific wording of the clause, which indicates expressly and unambiguously that the conditions became operable in the

event of acceptance. Further, he contended, Mr Tomlinson, as the Murrays' agent, was capable of binding them to those conditions once he accepted the offer.

Discussion

[168] Once again, I shared the views expressed by Mr Small. The conditions stated by Mr Petros in his offer do make it abundantly clear that it was only if the offer was accepted (specifically, in the event of acceptance) that the Murrays would be required to enter into the covenant, which would apply between the acceptance of the offer and the finalisation of the sale. Once the offer was accepted by Mr Tomlinson as the highest and the best, in his judgment, then he would have bound his principals to whatever conditions were attached to those offer. It was incumbent on him to have read them. His failure to do so cannot be laid at the feet of Mr Petros, in whose interest he was also obliged to act. He was the sole arbiter of what was best.

[169] It seemed, at least, highly improbable that the Murrays' could succeed in advancing on appeal the argument that the learned trial judge's finding that the conditions were "not conditions precedent in the classical sense", is plainly wrong.

[170] Similarly, without any discernible merit is the Murrays' contention that Mr Petros' offer, having included the relevant covenants, would have required that they should have first been put to them, "for their express consent and agreement" before the bid was accepted by Mr Tomlinson. This argument must also be viewed against the background that Mr Tomlinson was vested with the authority to act for and on behalf of the parties in choosing the highest and best bid. The exercise of this authority, it

seemed to me, was not subject to an express provision that the parties were to first be advised of any conditionality, prior to him accepting what, in his absolute opinion, was the highest and best bid.

[171] The learned trial judge found that the agreement between the parties gave Mr Tomlinson the unfettered discretion to choose which of the bids he found to be the best, based on his best judgment. Once the offer was accepted by their agent, then the Murrays were bound to accept the express covenants included in the offer and, especially, when it cannot be said that the conditions were unreasonable.

[172] I formed the view that the Murrays would be hard-pressed to persuade a court to the view that Mr Tomlinson, in accepting Mr Petros' bid, acted outside the scope of his authority, thereby rendering the learned trial judge's findings that they were bound by his action, palpably wrong.

[173] The likelihood of success on appeal, relative to the issue of the conditions contained in Mr Petros' offer of 6 March 2013, was not satisfactorily established, in my estimation, for me to hold that a stay of execution would be justified on this basis.

[174] Having considered the reasoning of the learned trial judge and the facts he had before him, I found that the general challenge raised in the relevant grounds of appeal, concerning the appropriateness of the grant of an order for specific performance, is not of sufficient potency or merit to warrant a stay of the learned judge's order for specific performance.

Issue (iv)

Whether the learned trial judge erred in finding that an estoppel arose against the Murrays in the absence of such pleadings (ground 10)

[175] The learned trial judge having considered the assigned role of Mr Tomlinson in the bidding process concluded that the Murrays were bound to honour the agreement for sale of the shares to Mr Petros. He opined that the conditions were not shown to be unusual and that they appeared to be terms, which any well-drafted contract of this type could reasonably contain. He ultimately declared that an estoppel arose in favour of Mr Petros, having regard to the agreement between the parties.

[176] The Murrays contended that it is not in dispute that estoppel was neither pleaded nor proved, and as such, ought not to have been relied on by the learned trial judge in arriving at his decision.

[177] Mr Small, responded, however, by pointing out that an individual's failure to plead a particular point in its statement of case does not preclude the court from considering the point. Relying on the decision in **The Attorney General and others v Jeffrey Joseph and another** [2006] CCJ 1 (AJ), Queen's Counsel averred that the court was open to consider principles of law not specifically pleaded by a litigant. It was, accordingly, open to the learned trial judge to consider the principle of estoppel, he said. In any event, he submitted, the learned trial judge's findings on estoppel were based on his findings of fact as to what constituted the terms of the agreement.

Discussion

[178] Miss Davis' submissions that estoppel was not pleaded by Mr Petros, and was not relied on by him, are accepted. However, in reading the learned trial judge's reasons, it seemed to me that the word was not used in the strict legal sense to connote its strict legal meaning. It was evidently used, rather loosely, I would say, to convey the notion that the Murrays should simply be "precluded" from refusing to covenant in the terms stipulated. It was not, I would admit, a careful choice of expression given that estoppel carries with it a legal meaning over and above a mere right to preclude someone from asserting something or relying on something.

[179] In any event, it does seem, as Mr Small pointed out, that the learned trial judge's finding of what he called an estoppel was simply a way of saying that based on the terms of the agreement, the Murrays were bound by the action of Mr Tomlinson. So, even if he did not expressly state that he found that an estoppel arose, he would, nevertheless, have arrived at the same conclusion that the Murrays should be precluded from denying the agreement entered into by Mr Tomlinson as their agent. Therefore, even if the court were to conclude at the hearing of the appeal that the learned trial judge was wrong in finding that an estoppel arose as a matter of law, that would not be sufficient to render his overall decision to grant specific performance assailable. This is so, because his findings would, more likely than not, have been the same. He would have concluded that the Murrays are bound to honour the agreement entered into on their behalf, by their duly appointed agent, who acted within the scope of his authority to accept the highest and best offer.

[180] I, therefore, concluded that there is no prospect of success in the arguments that the learned trial judge erred in holding that the Murrays were bound to honour the agreement to sell the shares to Mr Petros by the acceptance of his offer by Mr Tomlinson. The learned trial judge's assertion that an estoppel arose to hold them bound does nothing to take away from that critical finding, which he made, that there is a binding enforceable agreement between the parties that would satisfy the law for the grant of specific performance as a remedy.

Disposal of the application for stay

[181] Having given due regard to the circumstances of the case, the learned trial judge's decision that is being challenged as well as the submissions of counsel on both sides, I found it difficult to conclude that there is any proper basis, in fact and/or in law, to grant a stay of execution of the judgment. The prospect of success of the appeal was not discernible. This, of course, was sufficient to dispose of the application.

[182] Although I am not required to go on to examine the risk of injustice in the light of my finding as to the merit of the appeal, I found it useful, however, to make reference to Miss Davis' submission that if a stay were not granted, the appeal would be rendered nugatory. It should be noted that this submission was not accepted, partly in the light of the undertaking provided by Mr George on Mr Petros' instructions in his affidavit of 6 July 2016. At paragraph 6, the undertaking is set out in the following terms:

> "6. Furthermore I have been duly authorized by [Mr Petros] to give the following undertakings on his behalf:

> (a) [Mr Petros] will not sell, gift, exchange or otherwise dispose of any shares in the Company before the hearing of the appeal,
>
> (b) the shares will remain in his name or the name of his wholly owned nominee company pending the determination of the appeal, and
>
> (c) if the appeal is successful, [Mr Petros] will abide any order of the Court to retransfer the shares and the proceeds to the [Murrays]."

[183] From these undertakings, it seemed clear that Mr Petros was prepared not to dispose of the relevant shares before the completion of the appeal and was prepared to re-transfer the shares and proceeds flowing from them, to the Murrays if they succeeded on the appeal. This undertaking should serve to abate or ease the concerns raised by the Murrays that the shares in the company would be disposed of, or otherwise dealt, before the hearing of the appeal, thus putting them in a less favourable position.

[184] When the competing arguments with regards to which of the parties was likely to suffer more prejudice, or which bears the likely risk of harm were considered, I did not find that the refusal of the stay was likely to cause irremediable harm or injustice to the Murrays greater than that which would have been caused to Mr Petros. This is, primarily, because of the dubious chance of success of the appeal coupled with the undertaking provided by Mr Petros through his counsel.

[185] It is for the foregoing reasons that I agreed with my brother and sister that the orders as set out in sub-paragraphs [4](2), (3) and (4) above should be made.

F WILLIAMS JA

[186] I have read in draft the reasons for judgment of my sister McDonald-Bishop JA. I agree with her reasoning and conclusion and there is nothing that I could usefully add.

P WILLIAMS JA

[188] I too have read in draft the reasons for judgment of McDonald-Bishop JA. I agree with her reasoning and conclusion and there is nothing that I could usefully add.