JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 11/2012

APPLICATION NO 156/2012

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**DYC FISHING LIMITED**	**APPLICANT**
AND	**PERLA DEL CARIBE INC**	**RESPONDENT**

Ransford Braham QC and Christopher Dunkley instructed by Phillipson Partners for the applicant

Abraham Dabdoub and Miss Karen Dabdoub instructed by Dabdoub Dabdoub and Company for the respondent

31 July and 13 August 2012

HARRIS JA

[1] I have read the judgment of my learned sister Phillips JA and I am fully in agreement with her reasons and conclusion.

DUKHARAN JA

[2] I too have read the judgment of Phillips JA and agree with her reasons and conclusion.

PHILLIPS JA

[3] This is a fresh application filed on 19 July 2012, by the applicant, for a stay of execution of the judgment of R. Anderson J made on 17 December 2011. The applicant sought the following orders:

> "1. This Honourable Court do hear and grant a stay of execution until the final determination of this matter or further order of this Honourable Court of Appeal.
>
> 2. That this Honourable Court of Appeal do discharge the Provisional Charging and Attachment Orders and Injunction made by the Honourable Mr. Justice K Anderson on the 16th July 2012.
>
> 3. Further and or in the alternative the Provisional, Charging and Attachment orders and Injunctions made by the Honourable Mr. Justice Evan Brown on 13th February 20120 ought to be varied as follows:-
>
> a) The Appellant be permitted to carry on its normal business operations, including:-
>
> i) receiving payments into its bank accounts by cheque, wire transfers, cash or in any other form;
>
> ii) making payments in relation to:-
>
> - Plant processing inputs
> - Utilities
> - Suppliers of processing related goods and services;
> - Plant operations and maintenance;
> - Trucking;
> - Payroll;
> - Attorney's fees;
> - Government taxes, fees, permits and levies;
> - The harvesting, storage, processing, sale of conch and other fishery products.
>
> b) The hearing to make final the Provisional Charging, Attachment orders and Injunctions made

by Honourable Mr. Justice Evan Brown be postponed until the final determination of the Appeal or further order of this Honourable court of Appeal."

[4] It is perhaps best to set out the history of the matter which has resulted in this new application being filed so that it can be put within its proper context.

[5] Subsequent to the judgment of R. Anderson J on 17 December 2011, the applicant filed an amended notice and grounds of appeal on 27 January 2012 seeking, inter alia, to set aside the said judgment. On 13 February 2012 E. Brown J made provisional charging and attachment orders and granted an injunction. The applicant thereafter filed an application for a stay of execution of the judgment of R. Anderson J which came before me and was heard and determined on 17 May 2012. I made the following orders:-

"(i) There shall be a stay of execution of the judgment of Anderson J dated 17 December 2011, until the determination of the appeal, or until further order of this court on the condition that the appellant provide security satisfactory to the respondent in the amount of 15% of the judgment sum, on or before 30 June 2012.

(ii) There shall be liberty to apply, with regard to the security to be provided, within 10 days of the date hereof, if the security to be provided has not been satisfactorily agreed between the parties.

(iii) There shall be no order as to security for costs, and no costs are awarded on the application.

(iv) Costs of the application on the stay of execution of the judgment shall be the respondent's to be taxed if not agreed."

[6] Pursuant to the liberty to apply provision in paragraph (ii) of the above order the applicant made an application for clarification of the order relative to the security to be provided, as a condition of the order for the stay. On 5 June 2012, I provided that clarification by directing that the properties which are the subject of the provisional charging order may be utilized to comply with the order in respect of the said security required as a condition of the stay.

[7] Subsequent to the above order and clarification, the respondent filed Application No 127/2012 for the full court to vary and/or discharge the order, and the applicant filed Application No 128/2012 asking the full court to discharge the provisional charging order, attachment of debt order and the injunction.

[8] On 6 July 2012, the full court ordered as follows:

> "1. The order for the Stay of execution of the judgment is varied by ordering that the judgment sum is to be paid into an interest bearing account in the joint names of the attorneys-at-law.
>
> ALTERNATIVELY
>
> The Appellant to provide a letter of commitment from a reputable financial institution for the payment of the Judgment sum on or before the 13th July 2012.
>
> 2. On condition that the Applicant complies with the above, the provisional charging orders, the provisional attachment orders and the injunctions are hereby discharged.
>
> 3. There shall be no order as to costs."

[9] The applicant failed to comply with the order above in that the sum was not paid nor was a letter of commitment obtained from a financial institution in respect of the judgment sum.

[10] The appeal came up for hearing before the court on 16 July 2012, but was adjourned to commence on the following day, and the situation with regard to the applicant's failure to comply with the orders made by the court on 6 July 2012 was brought to the attention of the court. The applicant indicated that it had experienced difficulties whilst attempting to comply with the order and indicated that an application would be filed requesting certain further orders from the court. We commenced hearing the appeal on 17 July 2012. On 18 July 2012, the applicant informed the court that the respondent had obtained further provisional charging orders, attachment of debt orders and injunctions from K. Anderson J in respect of the same judgment debt and relating to the same assets the subject of the former orders made by E. Brown J on 13 February 2012.

[11] It appears that neither counsel representing the parties appreciated the portent and content of the order made by the full court, to the effect that the discharge of the provisional charging order, attachment of debt order and injunction was conditional on the applicant complying with the order to pay the judgment sum or to obtain a letter of commitment from a financial institution in that amount. The conditions having not been met, the orders made by E. Brown J remained in place and therefore the order made by K. Anderson J could have no effect. Additionally, the conditions not having been met, the order for the stay of execution which was made on that basis lapsed.

[12] The application filed on 19 July 2012 and amended on 31 July 2012 was therefore an attempt to give the applicant some protection in respect of its assets, as the former stay granted by me was no longer extant, and the respondent had advised that the application to make the provisional orders final was set for hearing on 14 August 2012. On the other hand, the respondent was endeavouring to ensure that should the appeal be unsuccessful, there would be assets to secure the judgment, as the applicant had failed to secure the same by payment of the judgment debt or by way of a letter of commitment from a financial institution as ordered by the court.

[13] In respect of this fresh application for stay of the judgment of R. Anderson J, the applicant relied on an affidavit of Frank Cox, its managing director sworn to on 19 July 2012, wherein he stated that he was duly authorized to swear to the same on its behalf. It was the affiant's contention that when the full court was making its order, initially, the only direction was for the applicant to pay the full judgment debt into an interest bearing account in the joint names of the attorneys-at-law, within seven days, as a condition of the stay, and this order was based on the court's understanding that he had stated in an affidavit, which was before the court, that the applicant could afford to pay the judgment debt as a condition of the stay. However, when his attorneys informed the court of "that misconstruction" of his affidavits, the court immediately made the alternative order that it obtain the letter of commitment.

[14] He further testified that having discussed the matter with the applicant's bankers he had been informed that it was not possible, obviously for them to issue a letter of commitment in seven days, as they were not aware of any other institution in Jamaica

which would be prepared to process mortgage financing for the amount of US$2,000,000.00 in under 120 days. He was further informed that the properties would have to be valued by a member of the bank's panel of approved valuators. Additionally, if there were any breaches discovered on the certificates of title for the respective properties those would have to be rectified before the registration of any mortgage could occur, which could result in delays. What was important however, he deposed, was that the process for the issuance of a letter of commitment was the same, as for a loan, as the bank's obligation to honour its commitment remained the same. This was the explanation given by the applicant for its failure to comply with the conditions, as varied and imposed by the full court.

[15] It was Mr Cox's further averment that the applicant was currently engaged in the conch 2012 fishing season and the provisional charging order, attachment of debt order and injunction were extremely disruptive to the business of the company. The company was obliged to deploy 200 fishermen to harvest the conch and for many of these persons that was their only income for the year. He further deposed that any restraint on the applicant's accounts at this time would have "a devastating effect on our operations, staff and fishers, causing irreparable harm to our market and thus even greater financial hardship on our company". The applicant, he averred, was prepared to have its business premises at 23 Brentford Road and all the equipment located there charged to secure the debt, and he indicated that an injunction could be granted restraining the disposal of the properties pending the determination of the appeal. The applicant entreated the court, however, not to permit the monies in the applicant's

accounts, and/or the seafood products processed or sold, to be the subject of either the charging order or an injunction.

[16] At the close of the hearing of all the submissions on appeal, it was decided that that this application would be determined on paper. Counsel were therefore invited to put their submissions in writing, which they did, and for which we are most grateful as they have been helpful in disposing of this application.

The submissions

[17] Queen's Counsel for the applicant submitted that notwithstanding the two previous orders for a stay granted by the court, the applicant was still entitled to make, and the court obliged to entertain, a fresh application for a stay. He submitted that the court had dealt with the previous applications by virtue of its case management powers under the Court of Appeal (CAR). Counsel relied on rules 2.14 and 1.7(2) and (7) of the CAR, recognizing that the lodging of an appeal does not operate as a stay unless a judge or a court so orders, and that the court can give directions or make any other orders for the purpose of managing the appeal and furthering the overriding objectives, inclusive of which is the power to vary or revoke those said orders. Counsel therefore entreated the court to apply rule 2.15 of the CAR. He argued that it was not in dispute that the appeal was an unusual one in respect of the issues arising therein, and the court should ensure that in the interim, based on the respondent's efforts to secure its debt and to put itself in a position to dispose of the applicant's assets securing the same, that the appeal not be rendered nugatory.

[18] Queen's Counsel referred to **Sarah Brown v Alfred Chambers** [2011] JMCA App 16, a decision of this court, to support the argument that this court can vary or revoke its order. He referred to cases cited in the judgment, namely, **Cristel v Cristel** [1951] 2 KB 725, which was relevant to an order dealing with "liberty to apply" and **Collier v Williams** [2006] 1 WLR 945, which indicated that the court will revoke its earlier order if there are changed circumstances or if it was misled as to the correct factual position before it.

[19] In the instant case, the full court had been under a misapprehension, he submitted, that the applicant's affidavits had stated that it had the funds, that is cash, to pay the judgment debt, when the applicant had not said that. To the contrary, it had said that there were sufficient assets to cover the judgment debt, which is a different thing as that would require the company to liquidate its assets, and perhaps the business, to satisfy the debt. It was the submission of learned Queen's Counsel that the court may not have made such a draconian order, for the full sum to be obtained within seven days, had that situation been clear, particularly since it could have the effect of rendering the stay futile. He also referred to the affidavit in support of this application before us, particularly the information from the applicant's bankers that due to the amount of the judgment debt, it would be difficult to process any loan in relation thereto within 120 days much less the seven days given by the court. Counsel argued that the fact that this court had now heard the appeal, as against the situation which obtained when the full court reviewed the ruling of the single judge of appeal, amounted to changed circumstances.

[20] Queen's Counsel therefore asked the court either under its case management powers and in furthering the overriding objective, and/or pursuant to its inherent jurisdiction, to grant a stay of execution of the judgment of R. Anderson J in spite of the order made on the 6 July 2012, by the full court of appeal.

[21] Queen's Counsel also reminded the court that the single judge of appeal had found in May 2012, that there were some prospects of success in respect of the appeal. So too had the full court, and this court was in an even better position to conclude that the appeal was not a fanciful one, but one with substantive and significant arguments that are of merit. The full court had also discharged the provisional charging orders, which counsel submitted, the court was entitled to do pursuant to rule 2.15(g) of the CAR. Counsel also referred the court to Mr Cox's affidavit in support of the application, particularly paragraphs 16 and 17 thereof, for a suggested adjustment of the provisional charging order, which would facilitate the continued operation of the applicant, but would yet secure the judgment debt for the respondent. This is essentially set out in the amended notice of application.

[22] Counsel for the respondent submitted that this court did not have the jurisdiction to entertain an application to vary or discharge the provisional charging order, the attachment of debt order and the injunction. The court also, it was submitted, lacked the jurisdiction to vary and/or discharge the stay of execution ordered with conditions by the full court on 6 July 2012, save and except to order an extension of time to fulfill the conditions in respect of which the stay was granted.

[23] Counsel referred to section 10 of the Judicature (Appellate Jurisdiction) Act (the Act) which accords the court the jurisdiction to deal with appeals from any judgment or order of the Supreme Court in all civil proceedings, inter alia, to submit that this court is not a court of original jurisdiction and pointed out that the provisional charging order, attachment of debt order and injunction were all made by virtue of the jurisdiction of the Supreme Court and pursuant to parts 48 and 50 of the Civil Procedure Rules (CPR). He argued further that the orders could therefore only be varied and/or discharged by the Supreme Court. For this proposition he relied on **WEA Records Ltd v Visions Channel 4 Ltd** [1983] 1 WLR 721 which states, he submitted, that it was inappropriate for the Court of Appeal to hear an appeal from an order made ex-parte in the court below, which order had been executed and which was in the process of being considered by another judge of that court. Counsel maintained that the provisional charging and attachment orders had been granted in the Supreme Court, and had been executed in that the orders had been lodged at the Office of Titles and were set to be considered by a judge of the Supreme Court for the final orders to be obtained. The original jurisdiction relative to the enforcement of the judgment debt, he argued, did not fall within the purview of the appellate court. Counsel submitted that rule 2.14 of the CAR is applicable in that 2.14 (b) makes it clear that "no intermediate act or proceeding is invalidated by an appeal", which meant that the orders having been made prior to the application coming before the court, they would have to be recognized and accepted and could not be revoked. He also referred to and relied on **Ocean Software Ltd v Kay and Others** [1992] 2 WLR 633.

[24] Counsel submitted further that it was clear that the full court had considered the application for review of the order for stay made by the single judge of appeal when it came before them, had concluded that the security granted by the single judge was not adequate and having balanced the rights of all the parties, bearing in mind that the respondent had a right to enjoy the fruits of its judgment and that the applicant had a right to have the appeal heard, made the orders that it did. Counsel also submitted that the court must have also concluded that the properties which are the subject of the provisional charging order could not be utilized to secure the judgment debt. He also submitted that it was not appropriate for the panel who heard the appeal to hear and determine the fresh application for stay, and that it would be "undesirable" for this court to impose less stringent conditions on the grant of a stay than was done by the full court previously as that may telegraph a view held by the court on the outcome of the appeal.

[25] Counsel did not agree that there was any "misapprehension" of the affidavits filed on behalf of the applicant, as the evidence disclosed that the applicant had enough assets to satisfy the judgment debt and there was no averment that the applicant would be ruined if it lost the appeal and had to pay the judgment sum. He submitted that the affidavit in support of this application only indicated that the applicant would require more time to obtain the letter of commitment from its bankers but not that it could not do so. As a consequence, counsel submitted, the court should reinstate the order made by the full court save and except that the court should grant an extension of time until 14 September 2012 for the applicant to comply with the said conditions.

[26] Alternatively, counsel suggested that the court order that the applicant pay US$750,000.00 into an interest bearing account in the joint names of the attorneys, or provide a letter of undertaking from a reputable financial institution, accepted as such by the respondent, for that sum; that pending the determination of the appeal the provisional charging orders be varied to permit the normal business operations of the applicant as set out in the notice of application of the applicant, with some minor adjustments, provided however that all receipts and payments be properly documented and disclosed to the relevant government authorities, and that the applicant advise the respondent within 14 days of each and every transaction and activity undertaken. The hearing to make final the provisional charging and attachment debt orders would be postponed until the determination of the appeal or until further order of this court, and neither the applicant, nor its directors, servants and/or agents should maintain any accounts overseas in their respective names in which funds which ought to belong to the applicant could be deposited.

Analysis

[27] The principles relevant on the grant of a stay of execution of a judgment are well known. The traditional test, as stated in **Linotype–Hell Finance Limited v Baker** [1992] 4 All ER 887 which required that the applicant show that he had some prospect of success and that without a stay he would be ruined, has been widened so that the court now approaches the consideration of such an application liberally with a view to ascertaining the interests of justice, and focuses on the risk of injustice and whether one party or the other may in the interim suffer irremediable harm (**Paymaster**

(Jamaica) Limited v Grace Kennedy Remittance Service Ltd and Paul Lowe [2011] JMCA App 1). In this case, there are some prospects of success on appeal, so the first hurdle has been crossed.

[28] Section 10 of the Act reads as follows:

> "PART III. Appellate Civil Jurisdiction
>
> 10. Subject to the provisions of this Act and to rules of court, the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings, and for all purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court shall subject as aforesaid have all the power, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations, 1958."

[29] In my view, on a literal interpretation of the above section, this court, while determining civil appeals from the Supreme Court, has the jurisdiction for all purposes of and incidental to the hearing and determination of any appeal. As a consequence, this court is endowed with the jurisdiction to hear a fresh application for the stay of execution of a judgment on appeal from the Supreme Court, as it is incidental to the hearing and determination of the appeal. If this court were to find that the judgment and costs obtained in favour of the respondent in the Circuit Court of the 11th District in Miami Dade County Florida, for whatever reason was not enforceable here in Jamaica, then payment of the judgment sum or any other method of enforcement of the same would have to be set aside. The fact that the respondent is a foreign corporation,

resident in Florida with no other assets here in Jamaica and that there is no reciprocal enforcement of judgments between the two States makes the consideration of the application for a stay of the said judgment one of significance and incidental to the hearing and determination of the appeal. Additionally, the applicant has deposed that it is currently engaged in the conch fishing season, and the provisional charging order has been extremely disruptive on the business and the livelihood of the fishermen deployed in harvesting the conch. The applicant claimed that a refusal of the stay of execution of the judgment would cause irreparable harm and financial hardship to the company. However, the court must also at the same time consider the protection of the judgment creditor in the event that the appeal is unsuccessful so that the fruits of the judgment are available to it.

[30] Section 10 of the Act recognizes and embraces the rules of court and rule 2.15 of the CAR in setting out the powers of the court, includes all those stated at rule 1.7 of the CAR and those adumbrated in part 26 of the CPR. Rule 2.15 (2)(b)(g) of the CAR states that the court has the power to "make any incidental decision pending the determination of an appeal", which, in my view, would also include the application for a stay pending appeal. In my opinion, rule 1.7(2)(7) of the CAR is not relevant as we are neither varying or revoking the order made by this court on 6 July 2012 and I must pause to state that the cases cited by the applicant are unhelpful. We are considering the application de novo, as the earlier orders were made subject to certain conditions which having not been fulfilled, the orders have lapsed.

[31] We are therefore exercising an unfettered discretion, which, of course, must be exercised judicially. From the evidence before us, which was not contradicted, the full court appeared to have proceeded on the basis, in respect of the conditions imposed on the grant of the stay, that the applicant had stated in affidavits before it, that it had available cash to satisfy the judgment debt, and so an order was made to place those funds in an account so that the judgment debt would be secured. That not being the case, the accurate position as stated by the applicant was that it had assets sufficient to liquidate the debt. As deposed by the applicant, the alternative order which was made could not have been effected within the time frame given by the court. That being so, the provisional charging and attachment orders and injunction made by E. Brown J on 13 February 2012 remained in place and do so still. The subsequent orders by K. Anderson J in respect of the same parties, the same assets and the same judgment debt were, therefore, as stated previously, in my view, null, void and of no effect.

[32] There is no doubt that the lodging of an appeal does not operate as a stay of execution and that acts done or proceedings undertaken after judgment are not invalidated by the lodging of the appeal (2.14 CAR). In this case, the appeal was filed on 27 January 2012, the provisional charging and attachment orders were made on 13 February 2012, and the first application for a stay was granted on 17 May 2012. Part 48 of the CPR deals with the enforcement of a judgment debt by making charging orders. The charging order is made in the first instance without notice, and without a hearing. Once made, the judgment debtor is served with the provisional charging order, and other documentation in support for the hearing in respect of the final order.

A judge of the Supreme Court hears and determines both applications. That, however, does not preclude this court from restraining the hearing of the application for the final order by ordering a stay of execution of the judgment. Additionally, as indicated, this court is empowered, by its governing statute, to make any orders incidental to the hearing and determination of the appeal which would include the discharge of provisional charging and attachment orders which are antithetical to a stay of the judgment granted by this court on conditions. I do not agree with counsel for the respondent that the provisional charging and attachment orders, having been made by a judge in the lower court, and which may be in the process of being considered by another judge in that court, can only be discharged by that court. The case of **WEA Records Ltd v Visions Channel 4 Ltd**, referred to by counsel is, in my view, not applicable. In that case, an Anton Pillar order was made and executed. A motion was subsequently presented to discharge the order, but before a ruling was made in the court below, the matter was sent on appeal. In the circumstances, the Court of Appeal refused to entertain the appeal. However, it was expressly held, among other things, that the Court of Appeal had jurisdiction to hear an appeal from an ex parte order. This is clearly distinguishable from the present case, as the orders made pursuant to parts 48 and 50 of the CPR are inchoate. They cannot be enforced until made final. They cannot be made final if the execution of the judgment, which is the subject of the attempted enforcement is stayed, and/or the order, which is only provisional in the first instance, is discharged, or the hearing of the final order is postponed by this court, pending the determination of the appeal.

[33] Nor does the case of **Ocean Software Ltd v Kay and Others**, cited by the respondent assist it. That case merely shows that an application to discharge an order made by the Court of Appeal from the order of the court below, should be made to the court below. This is not the case in the matter under review.

[34] In my view therefore, this court, being empowered to consider and determine the fresh application for a stay of execution of the judgment of R. Anderson J, on the basis of the evidence and the information before us and guided by the principles which govern such an application, particularly the interests of justice and ensuring the least risk of the harm of injustice, may make such orders and impose such conditions as it deems fit in all the circumstances.

[35] In the light of all of the above, I would do the following:

1. grant a stay of execution forthwith, of the judgment of R. Anderson J dated 17 December 2011, until the determination of the appeal or until further order of the Court of Appeal on the condition that:

   (a) the applicant provide security to the respondent in the amount of US$750,000.00 on or before 31 October 2012 and the properties which are the subject of the provisional charging order can be utilized to effect this; or alternatively

   (b) the applicant pay into an interest bearing account in the joint names of the attorneys–at–law the sum of US$750,000.00 on or before 31 October 2012; or alternatively

(c) the applicant provide a letter of commitment from a reputable financial institution for the payment of the sum of US$750,000.00 on or before 31 October 2012, and the properties which are the subject of the provisional charging order may be utilized to effect this;

2. discharge the provisional charging and attachment orders and injunction made by K. Anderson J on 16 July 2012;

3. vary the provisional charging and attachment orders and injunction made by E. Brown J on 13 February 2012 in terms of paragraph 3(a) and (b) of the application;

4. postpone the hearing to make final the provisional charging and attachment orders and injunction until the final determination of the appeal or further order of this Honourable Court;

5. award basic costs to the respondent in the sum of $64,000.00.

HARRIS JA

ORDER

1. There shall be a stay of execution forthwith, of the judgment of R. Anderson J dated 17 December 2011, until the determination of the appeal or until further order of the Court of Appeal on the condition that:

(a) the applicant provide security to the respondent in the amount of US$750,000.00 on or before 31 October 2012 and the properties which

are the subject of the provisional charging order can be utilized to effect this; or alternatively

(b) the applicant pay into an interest bearing account in the joint names of the attorneys–at–law the sum of US$750,000.00 on or before 31 October 2012; or alternatively

(c) the applicant provide a letter of commitment from a reputable financial institution for the payment of the sum of US$750,000.00 on or before 31 October 2012, and the properties which are the subject of the provisional charging order may be utilized to effect this.

2. The provisional charging and attachment orders and injunction made by K. Anderson J on 16 July 2012 are hereby discharged.

3. The provisional charging and attachment orders and injunction made by E. Brown J on 13 February 2012 are varied as follows:

(a) The applicant is permitted to carry on its normal business operations, including:-

(i) receiving payments into its bank accounts by cheque, wire transfers, cash or in any other form;

(ii) making payments in relation to:-

- plant processing inputs;
- utilities;

- suppliers of processing related goods and services;
- plant operations and maintenance;
- trucking;
- payroll;
- attorney's fees;
- government taxes, fees, permits and levies;
- the harvesting storage, processing, sale of conch and other fishery products.

4. The hearing to make final the provisional charging order, the attachment order and injunction is postponed until the final determination of the appeal or further order of this Honourable Court.

5. Costs are awarded to the respondent in the sum of $64,000.00.