[2011] JMCA App 18

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 142/2010

APPLICATION NO 88/2011

BETWEEN	**JAMES JACKSON (Trading as Negril Tree House Resort)**	**APPLICANT**
AND	**CURTIS ARTHURS**	**RESPONDENT**

Leonard Green instructed by Chen Green and Company for the applicant

Crafton Miller and Mrs Vivette Miller-Thwaites instructed by Crafton S Miller and Company for the respondent

26 July and 19 August 2011

IN CHAMBERS

PHILLIPS JA

[1] This is an application brought by the appellant seeking an order that the judgment given by Rattray J on 29 October 2010 in favour of the respondent for special damages in the amount of J$241,859.00, general damages in the amount of J$8,320,000.00, and US$120,000.00 for the cost of future prostheseis be stayed until the appeal filed by the applicant on 30 November 2010 is heard and disposed of by the court.

[2] As the learned trial judge put it in his reasons for judgment, this case was about an unfortunate incident which took place in the waters just off the north coast of the island. The respondent was a spotter in the motor vessel the "Seacraft". His duties were to look out to ensure that the vessel's projected path was clear of swimmers, other sea craft and any form of floating debris. His primary function was to alert the driver of the boat of any danger in the water, so that he could take steps to avoid the same. However, on 25 May 1993, the driver, Mr Gladstone Bailey, on his way to dock the boat at Bloody Bay for safe keeping, suddenly, without any warning, caused the boat to surge forward and swing out to splash a passing boat. That manoeuvre resulted in the respondent being thrown from the boat into the water, where he came into contact with the boat's propeller and suffered severe traumatic injuries, in particular, the amputation of his right leg above the knee.

[3] The applicant relied on six grounds in support of the application:

1) The applicant was not in good health and required extensive medical care and was not therefore able to attend to his business which had fallen into disarray.

2) The learned judge fell into error in making the award of US$120,000.00 as the evidence adduced was inadequate.

3) As the learned judge failed to take important matters into account, and delayed for such a long time in delivering his

decision, the applicant had a good chance of succeeding on appeal.

4) If the judgment debt was paid over, the applicant would probably not be able to recover the same if he was successful on appeal.

5) The applicant had no cash resources available and loan facilities were not an option as he did not have the necessary collateral, and if he and his business Tree House Club Negril had to pay the judgment debt he would be financially ruined.

6) The applicant relied on rules 2.10, 2.11 and 2.14 of the Court of Appeal Rules (CAR) relative to the role of the single judge in chambers and the order of a stay of execution.

[4] The applicant's affidavit in support of the application, sworn to and filed on 21 April 2011, indicated that he had always and continued to contend that, the respondent at the material time had been engaged in activities which were not a part of the prescribed job for which he had been employed, and that he was therefore not liable to compensate him for the injuries received. The learned judge, however, had found to the contrary. He deposed that his health was deteriorating and he needed constant care due to an aneurism he had suffered some time ago, but for which the medical advice was that at his age, he should not contemplate surgery. He exhibited a medical report

from Dr Kenneth Lee, a cardiologist, as he was under his care. He stated further that his business was not doing well as it was not an all inclusive operation and was not able to compete well in that environment and, would be ruined if the business had to pay the judgment debt at this time. He was still hoping despite difficulties and unsuccessful attempts to obtain funding, that he would be able to make a substantial payment into court under protest pending the outcome of the appeal.

[5] He set out seven reasons he ought to succeed on appeal, and stated that in any event, the judgment debt would be reduced by the court. These reasons included the failure of the learned judge to make a finding whether the "splashing" fell within the scope of Gladstone Bailey's employment; his finding that the applicant had breached his contractual duty to provide a safe system of work; his failure to make a finding whether "splashing" was taking place at the material time, and whether the respondent was involved in it; his failure to deliver a balanced assessment of the evidence; his delay in delivering the decision and so the applicant was prejudiced; and his making of the order of US$120,000.00 without evidence to support it.

[6] The respondent in response said that he was unaware of the applicant's medical condition and when he had seen him, which was frequently, he appeared to be quite well. He stated that the applicant was a man of considerable means and aside from his business of the Negril Tree House Resort, he had sold two properties for the sum of $10,000,000.00 and $80,000,000.00 respectively, and that he operated a prosperous thriving cattle and chicken farm, whilst he, the respondent, had been unable to work due to the injuries received as a result of the incident in 1993. The applicant, he said,

seemed not to care about his severe predicament, as was evidenced from his reluctance to give any financial assistance whatsoever. He indicated that the applicant had no chance of success as the judgment of Rattray J was sound and balanced, and to support that position he pointed to various paragraphs where the learned judge referred to several discrepancies and inconsistencies in the evidence adduced on behalf of the applicant. He stated that that was one of the reasons the learned judge had preferred his evidence to that of the applicant.

[7] He indicated that the award of US$120,000.00 for the replacement of the prosthesis was reasonable. He also indicated that recently in June 2011 the prosthesis that he had been wearing had broken into three pieces and he was unable to replace the same. He was aware that J$6,300,000.00 had been obtained since the issue of a writ of seizure and sale which had been paid into court, but he had not been able to access the same from the Treasury despite efforts to do so. He pleaded that the stay of execution of the judgment not be granted as it would severely affect him financially, and also preclude his movement, as he was without an effective prosthesis and would remain in that condition unless he was able to obtain the fruits of his judgment.

[8] A further affidavit was filed on his behalf wherein his attorney confirmed that the order for seizure and sale was executed on 13 April 2011, that there was a payment into court of J$6,300,000.00 on 21 April 2011 and that in spite of filing the order to pay out of the Treasury on 19 May 2011, they had been unable to access the monies paid into the Treasury. A letter was exhibited from the bailiff indicating the goods and chattels which had been levied on 13 April 2011. These included seven motor vehicles,

two boats, one jet ski, 61 round tables, 10 wooden bar stools, one large freezer, 80 dressers, 80 colour television sets, four industrial stoves, 100 wooden chairs, six computers (including CPU monitors and printers) and sundry chairs and tables. The attorney seemed to have concern that some of the goods and chattels seized by the bailiff having not been sold to satisfy the judgment, had also not been seen by the bailiff on the applicant's premises on a subsequent visit there, they having not been taken into his custody. She stated that if the stay of execution was granted, the goods may be hidden, sold, transferred or otherwise disposed of, and out of the reach of the respondent to enforce his judgment, if the appeal fails. She exhibited a letter from the bailiff dated 14 July 2011 to underpin her concerns, but in my view, the letter was unclear as to whether the bailiff had a concern that the goods had "disappeared". He stated in the penultimate paragraph of the said letter, "I am of the opinion and verily believe that the defendant and or his agent will not dispose of the levied items remaining in their custody." It seemed to me that he was aware of the movement of the vehicles. All parties seemed to be awaiting the ruling on this application.

[9] On the morning of the hearing of the application the applicant filed his response. He said that the payment of the J$6,300,000.00 was made by virtue of loan financing from Scotiabank, which required repayment by way of considerable monthly sums. He referred to the downturn in the earning potential in the tourism industry over the past few years and particularly the non all inclusive operations. But he made this unusual statement in paragraph seven of his affidavit, which became the basis for the main thrust of the submissions of counsel for the respondent before me, although counsel

lamented that he had not had sight of the affidavit before the hearing of the application commenced:

> " 7. That I am involved in a development at Negril Spot in the parish of Westmoreland for which I am required to invest substantial sums of monies for road and infrastructure work so as to procure splinter titles to issue to persons who have deposited monies for the purpose of these lots. I am presently not in a position to fund the establishment of infrastructure development since I am gravely ill and without the financial means to do so. Without the Certificates of Titles I am unable to access further monies from the sale of properties from the Negril Spot development and it is not true to say that I am in possession of monies from the recent sale of properties."

[10] The applicant denied operating any cattle and chicken farm, as he said he had to give up the farm due to his illness. He said that he had made the initial cash payment on account of the judgment debt, "with due regard to the needs of the respondent and the hardship he would have suffered and in an effort to ensure that he does not suffer severe financial and physical hardship". He indicated however, that he was experiencing hardship due to the vehicles having been removed from the business premises by the bailiff, as not having the use of the vehicles was adversely affecting his ability to conduct his business effectively. He complained about the steps taken by the respondent to pursue the seizure of his goods and chattels in the light of this pending application, as he said the respondent knew how it would affect his business as a hotelier. He challenged yet again the award of US$120,000.00 as he stated the learned

judge had used the top end of the scale and a high multiplier based on the opinion of a doctor, whom he had already stated did not have the required expertise.

[11] The applicant therefore sought the intervention of the court "in the interest of justice" to grant the stay of execution of the judgment as prayed.

The submissions

[12] Counsel for the applicant relied on the fact that sums had been paid in partial settlement of the judgment debt and were available to the respondent. He submitted that the effect of the findings of the learned trial judge was that the applicant was deemed to be liable for the injuries suffered by the respondent as the respondent's employer and as the employer of the driver of the boat who was involved in extremely irresponsible behavior, but not as a result of any deliberate act on the applicant's part. He referred to the fact that the applicant was gravely ill, that the levy of the goods by the bailiff was having a drastic effect on the applicant's business and ruin of the business was envisaged. He asked me to make the order of the stay of execution referable to the situation which obtained prior to 13 April 2011, when the goods were seized. He referred to the notice and grounds of appeal and submitted that the applicant had a good arguable appeal, so in the interest of justice the stay ought to be granted. He relied on **Paymaster v Grace Kennedy Remittance Services Ltd and Paul Lowe** [2011] JMCA App 1, a decision from this court for the relevant principles in respect of the grant of a stay of execution of a judgment and rules 2.10, 2.11 and 2.15 of the CAR. The latter, he said, embraced rule 26.1(2)(e) of the Civil Procedure Rules.

[13] Counsel for the respondent commenced by submitting that the relevant rules for this application were rules 2.11 and 2.14 of the CAR. Rule 2.15 referred to the powers of the Court of Appeal and not the powers of the single judge and would therefore be inapplicable, with which I entirely agree. Counsel then challenged the sincerity of the applicant's alleged inability to pay the judgment debt, when on the other hand he was involved in a development, "Negril Spot", in which he was required to pay substantial sums. He said the respondent's position was that the applicant had sold properties for large sums, and counsel asked me to conclude that there had not been full disclosure of all the facts. If a subdivision existed, there must be purchasers paying money, he submitted, so the respondent's observation may be correct. Counsel submitted that the execution process had already been carried out and the remedy asked for was "ex post facto" and inapplicable in the circumstances. Counsel referred to the delay by the applicant to make any payment to assist the respondent as the application for the writ of seizure and sale had been made early in the year, and yet no funds were paid until after the bailiff had acted, which resulted in a further increase in expenses. He referred to the assets seized from the applicant's premises including two boats and submitted, quite strenuously, that the applicant had ignored the plight of the respondent over the years. The respondent, he said, had been involved in the boat accident at the age of 19 years and had suffered ever since without to date receiving any financial assistance from the applicant. The respondent was now 37 years old. Counsel referred to the bill of costs which had been filed on behalf of the respondent, although not yet taxed, in the amount of approximately J$1,300,000.00.

[14] Counsel referred to the reasons for judgment of Rattray J and submitted that the applicant had no reasonable chance of success on appeal. He drew my attention to certain findings of the judge particularly the fact that he had found the respondent to be a "frank and forthright witness". The Court of Appeal, he said, ought not to interfere with the findings of fact of a single judge, who had the opportunity to observe the demeanour of the witnesses, and he referred to the principles enunciated in the House of Lords' case of **Watt v Thomas** [1947] AC 484, which have been adopted and applied by this court over the years. He submitted that the award made in respect of the prosthesis was reasonable as it was made when the respondent was 33 years old, with a reasonable life expectancy of 60 years old, but there was no reason, he said, the applicant could not live longer. In answer to a query from me, he indicated that the amount of the judgment debt was made up, approximately as follows:

1.	Special Damages (inclusive of interest up to May 2011)	J$ 466,000.00
2.	General Damages (inclusive of interest up to May 2011, for pain and suffering and loss of amenities, loss of future earnings and handicap on the labour market)	J$12,320,000.00
		J$12,786,000.00
	Plus: Future cost of prosthesis	US$120,000.00
	Plus: costs	

[15] With regard to the interest of justice, counsel maintained that it could not be just for the applicant to be investing in developments in circumstances where the

respondent has lost all quality of life, as he can no longer enjoy swimming and jumping and has been suffering throughout this very long period which has elapsed since the incident. The respondent, he said, is in need and the court ought not to look at whether ultimately he may be able to pay back any funds to the applicant, as there is very little chance of the applicant succeeding on appeal. He asked for an order that the monies paid into the Treasury be paid out, that funds be made available for a new prosthesis and that the applicant be restrained from disposing of any of the assets seized by the bailiff.

Discussion and Analysis

The jurisdiction to grant a stay

[16] Rule 2.14 of the CAR states that, except so far as the court below or this court may otherwise direct, an appeal does not operate as a stay of execution of the decision of the court below. However, rule 2.11(1)(b) permits a single judge of this court to order "a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal". The authorities indicate and it is now well established that a stay will not be granted, unless, and it is therefore incumbent on the applicant to disclose at this stage through the material provided, the appeal has "some prospect of success" (per Harrison JA in **Watersports Enterprises Ltd v Jamaica Grande Ltd and Others**, SCCA No 110/2008, Application No 159/2008, delivered 4 February 2009. The power of the court or a judge to grant or refuse a stay of execution of a judgment is discretionary and that right is unfettered (see Harris JA in

Paymaster). The judge must consider all the facts and exercise that discretion judicially in the interest of justice. **In Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065 Clarke LJ expressed the overriding consideration in this way, at paragraph 22:

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

In **Paymaste**r, Harris JA referred to other cases decided in this court, namely **Reliant Enterprise Communications Limited & Another v Infochannel Limited** SCCA No 99/2009 Applications 144 & 181/2009, delivered 2 December 2009, and **Cable and Wireless Jamaica Ltd v Digicel Jamaica Ltd** SCCA No. 148/ 2009 Application No 169/2009, delivered 16 December 2009, and stated that, "this court has given approval and support to the proposition that the interests of justice is an essential element in a decision to grant or refuse a stay".

The applicant's prospects of success on appeal

[17] The main issues in this case related to what caused the injuries suffered by the respondent and who was liable to compensate him. Also, there was the issue of

whether the respondent participated in the incident which caused his injuries. The question which arose for the court's consideration was whether the respondent and Gladstone Bailey were employees of the applicant, and whether the applicant was vicariously responsible for the acts of Mr Bailey, even if he was engaged in acts expressly prohibited by the applicant. Additionally, the court had to consider whether the applicant had breached the common law duties of care owed to the respondent to provide him with a safe system of employment. The learned trial judge made several findings, some of which I will set out below for ease of reference.

> "31. It is difficult to comprehend the assertions of the Defendant that Curtis Arthurs was involved in the splashing activities, which cost him his leg, as well as other injuries. There is no evidence before the Court to show what action if any, the Claimant took which could be viewed as an active step in the prohibited pastime, thereby causing him to be deemed to be a part of the unauthorised activity. The fact of his being present on the boat at the time 'splashing' was going on does not without more, in the circumstances of this case, lead to a conclusion that he was involved in that activity, and I am not prepared to make such a finding.
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> 32. I am satisfied, after a careful perusal of all the evidence presented in this matter that Curtis Arthurs testified in a frank and forthright manner. I find him to be a witness of truth and whenever there is a conflict between his evidence and that given by or on behalf of the Defendant, I accept his evidence. I find the evidence given by James Jackson and Rohan Myrie riddled with inconsistencies and not at all believable. I find as a fact that the accident which brought about the severe injuries sustained by Curtis

> Arthurs was occasioned by the actions of Gladstone Bailey in suddenly swinging the power speedboat in the direction of another vessel, which caused Mr. Arthurs to be thrown from the 'Seacraft' into the water.
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> 33. I do not accept as credible the assertions of the Defendant and his manager that the taking of the 'Seacraft' to safe harbour at Bloody Bay on the day in question by the employees was done on a voluntary basis. I find that they were instructed to carry out that particular task, as indicated by the evidence of Rohan Myrie and that that task was part of the duties for which they were employed. My finding in this regard is fortified by the unchallenged evidence of Curtis Arthurs, where he stated that his working day ended after returning from parking the vessel and being transported by taxi back to the Resort, where he showered and changed into his normal clothes before going home. I am therefore satisfied on the evidence and I so find that at the time this regrettable incident occurred, both Curtis Arthurs and Gladstone Bailey were acting in the course of their employment."

[18] The court then canvassed the law on vicarious liability and applied the principles to the case. The learned judge found that Gladstone Bailey having been employed by the applicant as the driver of the "Seacraft" had conducted the boat contrary to the express prohibition issued by the applicant (that is, the splashing), which the judge stated limited the way in which the boat operator was to carry out the work for which he was employed, but that the breach of the prohibition did not exclude liability to an injured third party. He concluded:

> "In the circumstances, I find that by his actions, Gladstone Bailey was performing in an unauthorized and improper manner, an act that he was employed

> to perform. As such, I find his employer James Jackson liable for the consequences of the actions of his employee Gladstone Bailey."

He went on to find also in respect of the boat's safety: "… I accept the evidence of the claimant and find that there were no rails on the 'Seacraft'. … No safety harness, seat belt or such device was affixed to that seat." He therefore concluded that, "… the employer James Jackson failed to take reasonable care for the safety of his employee, Curtis Arthurs while he was employed as a spotter on his boat the 'Seacraft' ".

[19] On the basis of the evidence disclosed in the reasons for judgment, but without having sight of the full transcript of the evidence adduced in the trial, and reviewing the learned judge's application of the relevant legal principles to that evidence disclosed, it would appear on the face of it that the learned judge addressed the relevant issues mentioned in paragraph [5] herein with clarity and care. Additionally, in keeping with the principle enunciated in the Privy Council cases out of this jurisdiction, viz, **Industrial Chemicals Ltd v Owen Ellis** (1986) 35 WIR 303 and **Union Bank of Ja. Ltd v Dalton Yap** Privy Council Appeal No 17/2001, delivered 28 May 2002, it may be very difficult to show that the single judge was plainly wrong. In my view, in the circumstances, the applicant would have no real chance of success on the issue of liability.

[20] With regard to the issue of damages, I was informed that the special damages were agreed between the parties. The specific challenge by the applicant is to the award in respect of the future cost of the prosthesis. I must say, in my view, this

ground of appeal does appear to have a real chance of success. The applicant exhibited to his affidavit filed on 26 July 2011, a letter from "Doctors Surgi-Clinic" over the signature of Dr Delroy Fray, an orthopaedic surgeon, dated 1 June 2005 which appeared to provide the evidence which grounded this award. The letter stated that the cost for the required prosthesis with a hydraulic knee component was between US$15,000.00 and US$25,000.00, and had a life span of between five and 10 years. The learned judge accepted the opinion of Dr Fray and utilised an average for computation, that is, a cost of US$20,000.00 with a life span of six years. The award, however, does not seem to address the vicissitudes of life or give any reduction for the upfront lump sum payment. This item also represents about 45% of the total award and 82% of the award in respect of the other items claimed, which is relevant to the application for the stay, particularly with regard to the pursuit of the proceeds of sale in respect of the items seized by the bailiff.

The issue of the interest of justice

[21] The applicant has provided evidence that he is not well, which has not been seriously opposed by the respondent. He has indicated that he would wish the respondent to receive the funds that he has obtained through the loan facilities of Scotia bank. Several substantial items have already been seized by the bailiff, although not sold, but remain available to satisfy the judgment debt if he loses on appeal. The applicant has given evidence also of the potential financial ruin facing him and his business with the levy of the vehicles by the bailiff. However, that action by the bailiff took place on 13 April 2011. Also, there is the concern that despite this potential

financial liability, he nonetheless appears to have been involved in investments in substantial undertakings. On the other hand, the respondent has also shown that he is and has been experiencing severe financial difficulties due to his permanent physical disability and his consequent inability to obtain work. He also has an immediate need for the replacement of his current broken prosthesis. Additionally, his condition has existed since 1993 without alleviation, and his case appears strong on the issue of liability. The interest of justice would therefore demand some redress.

The disposal of the application

[22] The respondent must obtain immediate financial assistance given my view of the issue of liability on appeal. However, because of the view I have also taken in respect of the issue of damages, I would order a stay of execution of the judgment only to the extent that it does not interfere with the release of the funds held in the Treasury, viz J$6,300,000.00, which ought to be released to the respondent forthwith, if that has not already occurred. A portion of this sum could be used to replace the broken prosthesis. I am not able to undo the action taken by the bailiff with regard to the seizure of the goods and chattels in April of this year, but I would order that no further execution occur pending the appeal or until further order of this court, which will ensure the availability of these assets for satisfaction of the judgment, if the respondent is ultimately successful on appeal. The applicant should ensure that no unauthorized action is taken to dispose of the goods seized.

[23] The conclusion is therefore that a limited stay of execution is granted. The sums paid into the Treasury are not affected by this order. The goods seized by the bailiff should not be sold or otherwise disposed of pending the appeal, or until further order of this court. There shall be no order as to costs.