[2019] JMCA App 17

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 3/2018

APPLICATION NO 154/2018

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

BETWEEN	**RAJU KHEMLANI**	**APPLICANT**
AND	**SURESH KHEMLANI**	**RESPONDENT**

Mrs Georgia Gibson Henlin QC and Seyon Hanson instructed by Seyon T Hanson & Co for the applicant

Kevin Williams and David Ellis instructed by Grant, Stewart, Phillips & Co for the respondent

25 March, 5 April and 5 July 2019

F WILLIAMS JA

[1] I have read in draft the reasons for judgment of my sister, Foster-Pusey JA. I agree that it was for these reasons that we made the orders in paragraph [8] of this judgment.

STRAW JA

[2] I too have read the reasons for judgment of my sister Foster-Pusey JA and agree that it was for these reasons that we made the orders in paragraph [8] of this judgment.

FOSTER-PUSEY JA

Background

[3] The parties have had a long history of litigation. The matter before this court stemmed from a notice of application for stay of execution and for stay of taxation filed 8 May 2018 by the applicant, Mr Raju Khemlani, which was heard by Brooks JA in June 2018.

[4] In the notice of application filed 8 May 2018, the applicant sought the following orders:

> " 1) That the order contained in the Judgment delivered on January 4, 2018 in Claim No. 10006 of 2017 entering judgment in favour of the Respondent and requiring 'costs to be agreed or taxed' be stayed pending the determination of this appeal;
>
> 2) That all taxation proceedings commenced by the Respondents in the Supreme Court be stayed pending the determination of this appeal;
>
> 3) That the enforcement of the costs awarded to the Respondent in the Supreme Court on the 20th day of July 2017 and which were taxed on the 5th day of October 2018 be stayed pending the determination of this appeal;
>
> 4) That the enforcement of the costs awarded to the Respondent in the Supreme Court on the 4th day of January 2018 and which is scheduled for taxation on the 14th day of June 2018 be stayed pending the determination of this appeal;

5) Costs of the application to be costs in the appeal; and

6) Such further or other relief as this Honourable Court deems just."

[5] The grounds on which the applicant relied are as follows:

"1. Rule 2.14 of the Court of Appeal Rules, 2002 provides unless so ordered by the Court below, or in this Court or a single Judge of this Court the filing of the appeal does not automatically operate as a stay of execution or of proceedings under the decision of the court below;

2. That rule 65.16 of the Civil Procedure Rules (CPR) provides that:

> 'Taxation is not stayed pending an appeal unless the court or the Court of Appeal so orders.'

3. Costs were awarded to the respondent on the 20th day of July 2017;

4. The Registrar's decision on taxation of those costs was appealed on the 3rd day of November 2017;

5. The Hon. Mr. Justice Sykes heard the appeal and dismissed it on the 4th day of January 2018;

6. That the Applicant has, in these proceedings, appealed the order of the Honourable Mr. Justice B. Sykes in Claim No. 10006 of 2017 on the 15th day of January 2018;

7. That the quantum of costs as determined by the Registrar of the Supreme Court in Final Costs Certificate filed on October 24, 2017 is subject to the outcome of the appeal which is currently before this Honourable Court, and the enforcement of same should await the hearing of the appeal and the Judgment of the Court of Appeal;

8. The Applicant's pending appeal has a real prospect of success;

9. That further costs would be incurred by both the Appellant and the Respondent in proceeding to Taxation in circumstances where the appeal is still pending and the outcome of same may change the award of costs in the matter;

10. If the judgment is not stayed the appeal may be rendered nugatory;

11. If the judgment is not stayed the Appellant/Applicant will also be subject to taxation proceedings and will be liable to pay the costs found to be due upon the conclusion of same in circumstances where the Judgment has been appealed and he has a real prospect of success on appeal in which event if he is successful the costs order may be reversed and costs may be ordered in his favour, or the costs order may be set aside; and

12. The granting of a stay is likely to produce less injustice than if it were refused."

[6] On 13 June 2018, Brooks JA heard and refused the application.

[7] As a result, the applicant, on 9 July 2018, pursuant to rule 2.11(2) of the Court of Appeal Rules, filed in this court a notice of application to vary and/or discharge the order of Brooks JA. That was the sole application originally before the court for consideration. However, the applicant, having recognized that the respondent had taken issue with the fact that the application had been filed out of time, sought to rectify same by filing, on the morning of 25 March 2019, an application for extension of time with supporting affidavit from Seyon Hanson filed on the same date. This was a preliminary issue that the court resolved before considering the notice of application to discharge and/or vary the order made by Brooks JA.

[8] Having heard submissions and arguments made by counsel, the court promised to indicate its decision on 5 April 2019, which was done in the following terms:

> "1. Application for extension of time to apply to discharge and/or vary the order made by Brooks JA on 13 June 2018 is granted.
>
> 2. Order made by Brooks JA on 13 June 2018 is discharged.
>
> 3. Application for stay of execution is refused.
>
> 4. Costs of the application to discharge and/or vary and for stay of execution are awarded to the respondent, Suresh Khemlani to be taxed if not agreed."

[9] The court however reserved its reasons, promised to provide same at an early date and now fulfils that promise.

Application for extension of time

[10] By way of a notice of application for court orders filed 25 March 2019, the applicant sought the following orders for extension of time:

> "1) That the Appellant be granted an extension of time to file the Application to vary and/or discharge the Order of the Honourable Mr. Justice Brooks JA which was made on the 13th day of June 2018;
>
> 2) That the Notice of Application to Vary and/or Discharge the order of a Single Judge and for Stay of Execution and Stay of Taxation which was filed in this Honourable Court on July 9, 2018 stand as filed within time;
>
> 3) That the time for service of this Notice of Application be abridged;
>
> 4) Costs to be costs in Application; and

5) Such further or other relief as this Honourable Court deems just."

Grounds in support of the application for extension of time

[11] In the notice of application for court orders filed 25 March 2019, the applicant outlined 16 grounds as follows:

"1) Pursuant to rule 1.7(2)(b) the court may extend or shorten the time for compliance with any rule even if the time for compliance has passed;

2) Pursuant to rule 26.1(2)(v) the court may make such orders or give such directions as will further the overriding objectives;

3) The Application has been made promptly;

4) The failure to comply with rule 2.11(2) was not intentional;

5) There is a good explanation for the failure if such failure is found by the Honourable Court;

6) The Appellant has generally complied with all other relevant rules, practice directions and directions;

7) The failure to comply with rule 2.11(2) was as a result of the Appellant's Attorney-at-Law not receiving the Notification to Parties Regarding Application to Single Judge of Appeal until Friday June 22, 2018 when same was received by fax;

8) The failure to comply has been remedied as the Application has already been filed and served, and the Appellant and Respondent are ready to proceed with the Application;

9) The effect of not granting the extension would prevent the Appellant/Applicant from pursuing his Application, and would be severely prejudicial and not in keeping with the overriding objective of justice;

10) That there would be no prejudice to the Respondent if the Appellant were allowed an extension of time if necessary within which to file his Application or if the said Application were permitted to stand as filed within time;

11) That an exercise of this Honourable Court's discretion in favour of the Applicant would be in the interests of justice, and in keeping with the overriding objective;

12) That the Appellant's application has merit, and has a reasonable prospect of succeeding insofar as the decision of the single judge made reference to and relied on statements of fact which were not in the Affidavit evidence before this Honourable Court;

13) That the Appellant has applied to the Court as soon as reasonable practicable after becoming aware that this Application was out of time. The assertion was made on the Respondent's behalf in submissions filed on the 22nd day of March 2019;

14) That the Appellant/Applicant only became aware that the Respondent was taking issue with whether the application was filed in time upon reading their speaking notes in relation to same, and made this Application as soon as possible thereafter and would not have sufficient time to serve same 7 days before the hearing of the application;

15) It would do an injustice to the Appellant if the application were not allowed to be heard; and

16) The amount at stake is substantial."

[12] Mrs Gibson Henlin QC apologised for the late filing of the application. Queen's Counsel explained that it was upon reading the respondent's speaking notes in response to the notice of application to vary and/or discharge the decision of Brooks JA that counsel became aware that the respondent would be taking the point that the application had been made out of time.

[13] In the speaking notes, counsel for the respondent had noted that the order of Brooks JA was made on 13 June 2018, however, the application to vary and/or discharge his order had only been filed on 9 July 2018, which was 27 days after the order was made. He argued that the application to discharge and/or vary the order made by Brooks JA ought to have been made within 14 days of 13 June 2018.

[14] When asked to indicate the position he was taking in respect of the extension of time application, Mr Williams, counsel for the respondent, indicated that the application had just been handed to him in court and he would need to take instructions. The court rose for some minutes allowing for both the panel and Mr Williams to read the notice of application and the supporting affidavit and for counsel to have discussions.

[15] Mrs Gibson Henlin, on the return of the panel, advised us that counsel for the respondent had taken the position that he would neither be consenting to, nor opposing the application, but was leaving the matter in the hands of the court. Further, that the outcome of the application would be impacted by a question as to whether the appeal had merit.

[16] The court therefore proceeded to consider the application for extension of time and thereafter the application to vary and/or discharge the order made by Brooks JA on 13 June 2018.

Ruling on the preliminary issue: - application for extension of time

[17] In making a determination on this point, the case of **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999, is applicable. In this case, Panton JA (as he then was) succinctly outlined at page 20 the relevant principles for consideration. He said:

> "The legal position may therefore be summarised thus:
>
> (1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.
>
> (2) Where there has been a non-compliance with a timetable, the Court has a discretion to extend time.
>
> (3) In exercising its discretion, the Court will consider-
>
> (i) the length of the delay;
>
> (ii) the reasons for the delay;
>
> (iii) whether there is an arguable case for an appeal and;
>
> (iv) the degree of prejudice to the other parties if time is extended.
>
> (4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done.

These principles are considered in the paragraphs which follow.

i. The length of the delay

[18] Counsel for the respondent contended that the applicant should have filed the notice of application to vary and/or discharge the order of Brooks JA within 14 days of the making of the order as stipulated by the rules. Queen's Counsel for the applicant argued however that they only became aware of the order and the date of the order on 22 June 2018. Therefore, the notice of application was filed on 9 July 2018, which was 14 days after that date.

[19] The application was indeed filed late. Rule 2.11(3) of the CAR provides:

> "Any order made by a single judge may be varied or discharged by the court on an application made within 14 days of that order."

[20] In this matter the length of the delay was 13 days, that is less than 14 days and, in my view, in all the circumstances, was not inordinate.

ii. The reasons for the delay

[21] The reason for the delay was outlined in the affidavit of Seyon Hanson filed 25 March 2019. He deponed that he did not receive the notification to parties regarding application to single judge of appeal until Friday 22 June 2018 when same was received by fax. Thereafter, the notification was emailed on the same date to the applicant and Mrs Gibson Henlin. On 23 June 2018, the applicant responded with his instructions. A draft notice of application to vary and/or discharge the order was sent to Mrs Gibson Henlin for her review and approval. At that time, she informed Mr Hanson that she was

involved in a ten-day trial at the Supreme Court and she only responded with her revisions on 6 July 2018.

[22] In the affidavit, Mr Hanson conceded that the time to file the notice of application to vary and/or discharge an order made by a single judge of appeal is within 14 days of the making of the order, but asserted that he was unaware of the date the decision was made and it was only on 22 June 2018 that he was made aware. As a result, the notice of application was filed 14 days after he was made aware; which is 9 July 2018.

[23] Further, counsel for the applicant had not realized that counsel for the respondent would be taking issue with the time that the notice of application was filed. That was only observed whilst counsel for the applicant was reviewing the respondent's speaking notes, which was sent on Friday 22 March 2019 by way of email.

[24] I find that the applicant's failure to file the application within the requisite time frame was not intentional and a good explanation has been provided for what occurred.

iii. Whether there is an arguable ground for the application to discharge or vary the order of Brooks JA.

[25] Queen's Counsel argued that there is merit in the application, and there is a real prospect of succeeding, because Brooks JA made reference to and relied on statements of fact which were not in the affidavit evidence before the court.

[26] I am convinced that this point is arguable and should be further examined in detail by this court.

iv. The degree of prejudice to the other parties if time is extended

[27] Queen's Counsel argued that the notice of application had already been filed and served and both parties were ready to proceed with the application. Further, if the applicant were to be precluded from pursuing the application this would be severely prejudicial and not in keeping with the overriding objective of justice.

[28] I observed that counsel for the respondent did not object with force on this point and that both parties were in fact ready to proceed with the application. There was no argument of prejudice to the respondent.

[29] For the foregoing reasons, and in the interests of justice, I thought it fit to grant the application for extension of time.

Application to vary and/or discharge the order of Brooks JA

[30] By notice of application for court orders filed 9 July 2018, the applicant has sought the following orders:

> "1) That the order of the Honourable Mr. Justice Brooks of the 13th day of June 2018 in Application No. 99 of 2018 be discharged and/or varied;
>
> 2) That the order contained in the Judgment delivered on January 4, 2018 in Claim No. 10006 entering judgment in favour of the Respondent and requiring "costs to be agreed or taxed" be stayed pending the determination of this appeal;
>
> 3) That all taxation proceedings commenced by the Respondents in the Supreme Court in connection with Claim No. 10006 of 2017 be stayed pending the determination of this appeal;

4) That the enforcement of the costs awarded to the Respondent in the Supreme Court on the 20th day of July 2017 and which were taxed on the 5th day of October 2018 be stayed pending the determination of this appeal;

5) That the enforcement of the costs awarded to the Respondent in the Supreme court on the 4th day of January 2018 and which is scheduled for taxation on the 2nd day of October 2018 be stayed pending the determination of this appeal;

6) Costs of the application to be costs in the appeal; and

7) Such further or other relief as this Honourable Court deems just."

Grounds in support of application to vary and/or discharge the order of Brooks JA

[31] There were 17 grounds on the basis of which the application was being made. They are as follows:

"1) Court of Appeal Rule ('CAR') 2.11(2) provides that any order made by a single judge may be varied or discharged by the Court;

2) The Learned Court of Appeal Judge erred by refusing the Appellant's application for a Stay of Execution and for a Stay of taxation in circumstances where if the Appellant is successful on appeal the said orders would be set aside and/or reversed, and proceeding with the Taxation in advance of the determination of the Appeal may result in an unnecessary use of Judicial time;

3) The learned Court of Appeal Judge erred insofar as he based his decision on the following statement as recorded in his direction/order:

> 'His explanation **<u>that the respondent cannot be found</u>** is not consistent with the experience of the court and the

record of the various orders which show that the respondent is present at every hearing' (emphasis…)

The learned judge's finding that the Respondent cannot be found, is not consistent with the evidence in the Applicant's affidavit of May [8], 2018;

4) The learned Court of Appeal judge erred insofar as he failed to take into account the fact that the Respondent has in the past caused the Bailiff to have to endorse an Order for Seizure and Sale 'nulla bona' and has only made payment after a Judgment Summons was issued against him in the same proceedings and orders made pursuant to same;

5) It is just in the circumstances of the case that the proceedings and the taxation be stayed pending the determination of the appeal;

6) Rule 2.14 of the Court of Appeal Rules, 2002 provides unless so ordered by the Court below, or in this Court or a single Judge of this Court the filing of the appeal does not automatically operate as a stay of execution or of proceedings under the decision of the court below;

7) That rule 65.16 of the Civil Procedure Rules (CPR) provides that:

> 'Taxation is not stayed pending an appeal unless the court or the Court of Appeal so orders.'

8) Costs were awarded to the respondent on the 20th day of July 2017;

9) The Registrar's decision on taxation of those costs was appealed on the 3rd day of November 2017;

10) The Hon. Mr. Justice Sykes heard the appeal and dismissed it on the 4th day of January 2018;

11) That the Applicant has, in these proceedings, appealed the order made by the Honourable Mr. Justice B. Sykes in Claim 10006 of 2017 on the 15th day of January 2018;

12) That the quantum of costs as determined by the Registrar of the Supreme Court in Final Costs Certificate filed on October 24, 2017 is subject to the outcome of the appeal which is currently before this Honourable Court, and the enforcement of same should await the hearing of the appeal and the Judgment of the Court of Appeal;

13) The Applicant's pending appeal has a real prospect of success;

14) That further costs would be incurred by both the Appellants and the Respondents in proceeding to Taxation in circumstances where the appeal is still pending and the outcome of same may change the award of costs in the matter;

15) If the judgment is not stayed the appeal may be rendered nugatory;

16) If the Judgment is not stayed the Appellant/Applicant will also be subject to taxation proceedings and will be liable to pay the costs found to be due upon the conclusion of same in circumstances where the Judgment has been appealed and he has a real prospect of success on appeal in which event if he is successful the cost order may be reversed and costs may be ordered in his favour, or the costs order may be set aside; and

17) The granting of a stay is likely to produce less injustice than if it were refused."

The proceedings before and the ruling of Brooks JA on 13 June 2018

[32] As mentioned above, on 8 May 2018, the applicant had filed a notice of application for stay of execution and for stay of taxation. The application was supported by an affidavit of Raju Khemlani filed on 8 May 2018.

[33] On 13 June 2018, Brooks JA, having considered the application, made the following orders:

> "The applications are refused. The applicant has not demonstrated that there is a risk of his not being able to recover the sums if they are paid.
>
> His explanation **that the respondent cannot be found** is not consistent with the experience of the court and the record of the various orders which show that the respondent is present at every hearing." (Emphasis added)

[34] It is in light of the above decision that the applicant applied to this court seeking an order that the decision of Brooks JA be discharged and/or varied. By a notice of intention to rely filed 9 July 2018, it was indicated that reliance would be placed on the affidavit of Raju Khemlani which had been filed on 8 May 2018 and was considered by Brooks JA.

[35] When Brooks JA considered the May 2018 application, no affidavit in response had been filed by the respondent. However, on 20 March 2019 the respondent filed an affidavit in response to that filed by the applicant on 8 May 2018.

[36] Queen's Counsel submitted that it would not be appropriate to consider the content of the respondent's affidavit filed in March 2019 in reviewing the decision made by Brooks

JA in June 2018. That is an eminently reasonable submission with which counsel for the respondent agreed. He however submitted that the affidavit may be taken into account by this court insofar as a determination is to be made as to whether to vary the order made by Brooks JA.

[37] It is my view that if the court were to find it appropriate to discharge or vary the order made by Brooks JA by virtue of some error identified, and therefore proceed to consider the matter afresh, it would be appropriate to take into account the respondent's affidavit filed on 20 March 2019.

Developments in the matter since the decision of Brooks JA in June 2018

[38] There are certain developments of some significance. It is noted that a number of the grounds in the above application referred to injustice and the "unnecessary use of Judicial time" which would occur were there to be taxation of the costs ordered by Sykes J (as he was then) arising out of his determination of the costs appeal.

[39] Taxation of those costs in fact occurred on 10 December 2018 and 29 January 2019 with final costs certificate issued on 11 March 2019.

[40] As a result of these developments Queen's Counsel applied to amend ground two of the notice of application to vary and/or discharge the order of Brooks JA so as to remove the words underlined:

> "The Learned Court of Appeal Judge erred by refusing the Appellant's application for a Stay of Execution and for a Stay of taxation in circumstances where if the Appellant is successful on appeal the said orders would be set aside and/or

> reversed, and proceeding with the Taxation in advance of the determination of the Appeal may result in an unnecessary use of Judicial time;"

The application was granted. While Queen's Counsel did not proceed to apply for further amendments to other grounds of the application, it is noted that a number of other grounds would also be impacted, for example grounds five (the words "and the taxation"), seven, 14 and aspects of ground 16.

[41] It is also important to bear in mind that the appeal heard by Sykes J arose out of a taxation of costs by the registrar, a final costs certificate in respect of which had been issued on 24 October 2017.

The relevant principles - Setting aside the exercise of discretion by a single Judge

[42] The basis on which this court will set aside the exercise of discretion by a single judge is not in dispute. The relevant principles were correctly identified by Queen's Counsel as having been succinctly outlined by Morrison JA (as he then was) in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1. Morrison JA stated at paragraph [20]:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference-that particular facts existed or did not exist-which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[43] Queen's Counsel submitted that this court is entitled to set aside the decision of Brooks JA, as the learned judge on the hearing of the application, "considered facts that did not exist". She argued that the applicant did not at any time in his affidavit state that the respondent could not be found. However, Brooks JA expressly stated in the reasons for his decision (in referring to the applicant) that "[h]is explanation that the respondent cannot be found is not consistent with the experience of the court….".

[44] Counsel for the respondent argued that Brooks JA was entitled, on the evidence before him, to infer that an argument was being made that the respondent could not be found for execution of any personal enforcement mechanism. He argued that the acquisition of an order for seizure and sale directs the bailiff to seize goods and chattels of the judgment debtor and is not a personal enforcement mechanism.

[45] The affidavit of Raju Khemlani makes no reference to any inability to find the respondent. On the other hand, Brooks JA referred to such an "explanation". It seems to me that this would in all likelihood have been a significant matter in Brooks JA's consideration. I do not agree with Mr Williams' submission that an inference such as he suggested was made or would have been safe. In the circumstances, a basis has been established for the court to discharge the order made by Brooks JA and consider the application afresh.

The principles on the basis of which a stay of execution will be granted

[46] The basis on which a stay of execution will be granted is well established. Queen's Counsel referred to the succinct statement of Phillips JA in the case of **Kenneth Boswell**

v Selnor Developments Company Limited [2017] JMCA App 30. Phillips JA at paragraph [48] noted that the primary consideration for the court is:

> "…whether there is some merit in the applicant's appeal and whether the granting of a stay is the order that is likely to produce less injustice between the parties".

These principles will now be examined below.

Is there some merit in the appeal?

[47] The substantive appeal was set down for hearing on paper in the very week when this notice of application to vary and/or discharge the order of Brooks JA came up for hearing. I would not wish to go into a review of all of the grounds of appeal. However, it is convenient to consider the submissions of Queen's Counsel in relation to the meaning of the word "re-hear" in Rule 65.29 of the Civil Procedure Rules (CPR). The rule states:

> "On appeal from a registrar the judge will-
>
> (a) Re-hear the proceedings which gave rise to the decision appealed against so far as is necessary to deal with the item specified in the appeal notice; and
>
> (b) Make any order or give any directions as he or she considers appropriate."

[48] In ground 4 of the notice and grounds of appeal, filed 15 January 2018, the appellant complains of the "restrictive" interpretation which Sykes J placed on the word "re-hear".

Sykes J's approach to the meaning of the word "re-hear"

[49] In examining this aspect of the appeal, it is necessary to look at the approach taken by Sykes J in determining the meaning of the word "re-hear" in the context of rule 65.29(a) of the CPR. In the judgment of **Raju Khemlani v Suresh Khemlani** [2018] JMCC COMM 1, Sykes J, at paragraphs [32] to [36], provided reasons for adopting the approach which Queen's Counsel describes as "restrictive".

[50] Sykes J opined that to "re-hear" according to the context and purpose of this rule, involved an examination of the registrar's decision to determine whether relevant principles and factors were considered, whether only relevant matters were taken into account and irrelevant matters were excluded. Also, whether the decision is not so unreasonable that no reasonable registrar could have come to that conclusion.

[51] He went on to say that "re-hear" does not mean a second hearing, that is, hearing the matter in full again and adducing evidence that was not before the registrar. Under the rule, a judge can only re-hear that part of the proceedings that gave rise to the decision that is being appealed. Part 65 of the CPR conveys a comprehensive taxation code. It outlines what should be stated in the bill of costs, makes provision for points of dispute and indicates the factors that the registrar should weigh and assess.

[52] Sykes J further explained that registrars are specialist taxation officers, and have a certain discretion, therefore their decisions should not be lightly disturbed unless there is some error of law or principle, misunderstanding of facts or exclusion of relevant matters or the taking into account of irrelevant material.

[53] This meant that in Sykes J's view, the role of a judge in an appeal from the decision of a registrar in taxation of costs proceedings, was more one of "review" as against a "re-hearing" in the course of which a fresh look would be carried out of every decision made by the registrar.

A look at Ernest Davis v General Legal Council

[54] Queen's Counsel referred to the case of **Ernest Davis v General Legal Council** [2015] JMCA Civ 33 and argued that, when one reviews this case it will be seen that Sykes J's reliance on English authorities relating to appeals from a district judge, costs judge or authorized court officer, in relation to the applicable meaning of a re-hearing, is "susceptible to challenge".

[55] The argument is that there are different procedural rules in England, and an appeal in similar circumstances as that which went before Sykes J, were it to have occurred in England, would not be a "re-hearing". Queen's Counsel referred to aspects of the **Ernest Davis** case and argued; "[t]his analysis supports the Applicant's position that the approach taken by Sykes J. (as he then was) was wrong, and ought properly to be clarified and corrected if so found by this Honourable court".

[56] Counsel for the respondent, in commenting on this aspect of the arguments, argued that none of the grounds of appeal had merit. He further stated that, in his view, Queen's Counsel was seeking to identify some kind of inconsistency between the principles identified in **Ernest Davis** and those followed by Sykes J, however, upon a close review of the judgments, there is no such inconsistency.

[57] I note that in the **Ernest Davis** matter, Brooks JA was hearing an appeal from a decision of the registrar of the court of appeal on a taxation of costs. Brooks JA outlined the jurisdiction of the single judge of appeal and the method of addressing an appeal from the decision of the registrar. At paragraphs [3]-[6] of the judgment he wrote:

> "[3] The Court of Appeal Rules (CAR) do not deal extensively with the issue of costs. Rule 1.18 stipulates that the relevant provisions in Parts 64 and 65 of the Civil Procedure Rules (CPR) apply to the award and quantification of costs in this court "subject to any necessary modifications and in particular to the amendments set out in" rule 1.18.
>
> [4] One of the necessary modifications made by rule 1.18 is that the term 'registrar', as used in parts 64 and 65 of the CPR, means, for the purposes of the CAR, 'the Registrar of the Court of Appeal' (rule 1.18(3)). Taxations and the mechanics of assessing costs of appeals are therefore to be done by the registrar of this court.
>
> [5] Appeals from the decisions of the registrar are considered in rules 65.26 through 65.29 of the CPR. Rule 65.27 states the authority of a judge of this court to hear those appeals. With the necessary modifications, pursuant to rule 1.18 of the CAR, to make rule 65.27 relevant to this court, it would read thus:
>
> ….
>
> [6] Rule 65.29 of the CPR sets out the powers of the judge on an appeal from the decision of the registrar. It provides that the appeal is by way of re-hearing. The re-hearing is limited, however, to the matters that are raised by the appellant. The rule states:
>
> > On an appeal from a registrar the judge will-
> >
> > (a) Re-hear the proceedings which gave rise to the decision appealed against so far as is necessary to deal with the items specified in the appeal notice; and

(b) Make any order or give any directions as he or she considers appropriate."

[58] Brooks JA noted that there were very few cases decided in these courts in respect of the application of rule 65.29. At paragraph [7] of the judgment he continued:

> "[7] There is guidance to be had, however, from some of the cases from England and Wales. The principle to be extracted from those cases is that the judge, who hears the appeal, will not interfere with the decision of the registrar unless the registrar "has acted on a wrong principle or taken into account irrelevant matters or failed to exercise his [or her] discretion…"

[59] Further, at paragraph [11], Brooks JA referred to rule 47.23 of the current English rules. This rule speaks to appeals from the decision of an authorized court officer and states:

> "On an appeal from an authorised court officer the court will-
>
> (a) Re-hear the proceedings which gave rise to the decision appealed against; and
>
> (b) Make any order and give such directions as it considers appropriate."

[60] The rule is indeed somewhat similar to rule 65.29 save that our rule states "re-hear the proceedings which gave rise to the decision appealed against **so far as is necessary to deal with the items specified in the appeal notice**" (emphasis added).

[61] Brooks JA referred to the case of **Allen and Another v Spence and Others** [2013] JMSC Civ 28. This was a case concerning an appeal brought against a detailed assessment of costs conducted by the registrar of the supreme court, in which Sykes J

referred to and relied on a number of cases in which, importantly, a re-hearing was not stipulated. In that case Sykes J did not highlight this distinction but concluded at paragraph [2] of his judgment:

> "What are the guiding principles in appeals in these kinds of cases? In the view of this court, it is important to recall that the assessment of costs is not capable of exactness. It is largely a matter of judgment on the part of the taxing officer, who in this case, has far more experience than perhaps many if not most of the judges of this court. This is what she does daily. Thus, the principle is that unless it can be shown that she made an error of principle, or the interpretation of some legal principle, or she omitted material considerations or included immaterial considerations appeals against her decision should not be entertained…"

[62] Having outlined the legal approach adopted by Sykes J, Brooks JA then outlined his view as to the approach to be taken in appeals from a registrar's decision in taxation of costs proceedings. At paragraphs [14] and [15] he stated:

> "[14] Despite the stipulation in rule 65.29 that the appeal from the registrar's decision should be treated as a re-hearing, it should not be said that Sykes J has stated the principle too strongly. It is agreed, that on the question of quantum, as Buckley LJ stated in **Mealing-McLeod,** that the judge conducting the appeal should not be, 'drawn into an exercise calculated to add a little here or knock off a little there. If the Judge's attention is drawn to items which…he feels should, in fairness, be altered, doubtless he will act'.
>
> [15] Based on that assessment, it must be recognised that the registrars, both of this court and of the Supreme Court, will have far greater experience than a judge, in either court, in determining what quantum of costs is reasonable and fair. Whereas in England, judges, on hearing an appeal from an authorised court officer or a costs judge, will often sit with referees who are experienced in the matter of litigation costs, that situation does not exist in this jurisdiction. A degree of deference should therefore be given to the exercise of

> judgment by the registrar, whose decisions on such matters should only be disturbed where it is shown that there has been an error in principle or on compelling material, which demonstrates that the exercise of that judgment resulted in an error."

[63] Queen's Counsel complained of the approach taken by Sykes J, who took the view that he was obliged to only look at matters affecting decisions made by the registrar. This would not include looking at the alleged "missing items" from the bill of costs which is the main bone of contention. She argued that to re-hear a matter means to look at it de-novo. This would allow for the learned judge to have looked at items which had not been examined by the registrar. Further the **Ernest Davis** case "puts the matter in context".

Finding on the point of merit

[64] When one compares the principles outlined by Brooks JA in the **Ernest Davis** case, and Sykes J in the costs appeal for consideration, at first glance there does not appear to be a difference in approach. Nevertheless, the issue raised is deserving of the further examination of this court, in light of the paucity of decisions on this issue and the need for definitive guidance to relevant parties. I therefore believe that there is indeed some merit in this ground. It is worthy of determination by this court bearing in mind that the decision will have to be made as to whether the role of the judge on an appeal from a taxation by the registrar is more one of "review" as against a "re-hearing" which could involve a far more interventionist role.

What is the order that is likely to produce less injustice between the parties?

[65] In the case of **Kenneth Boswell v Selnor Developments Company Limited** Phillips JA, at paragraph [48], helpfully outlined steps in the analysis of this question:

a. Is there a risk that irremediable harm may be caused to the Respondent if a stay is ordered but no similar detriment to the Appellant if it is not, then no stay should be ordered;

b. Is there a risk that irremediable harm may be caused to the Appellant if no stay is ordered but no similar detriment to the Respondent if a stay is not ordered then a stay should normally be ordered; and

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

[66] It is in considering this aspect of the matter, that I have found the affidavit of Suresh Khemlani which was filed on 20 March 2019 to be of great assistance. Suresh Khemlani states at paragraph 6 in the affidavit:

> "…However, Raju's appeal does not have a reasonable prospect of success and the mere fact that he has appealed, does not entitle him to preclude my ability to recover costs which I have incurred due to legal action which he commenced. In any event, Raju would face no prejudice in light of the fact that I have and will continue to comply with any Court award made in Raju's favour. I have recently paid **Eight Million Four Hundred and Ninety Thousand Three Hundred and Seventy One Dollars and Ninety One Cents ($8,491,371.91)** in order to satisfy an award in Raju's favour which is currently under appeal. Raju should therefore reciprocate such conduct. The aforementioned judgment debt was paid in monthly instalments of **One Million Dollars ($1,000,000.00)** and a final instalment of **Four Hundred and Ninety Thousand Three Hundred and Seventy One Dollars and Ninety One Cents ($490,371.91)** between the 28th of February 2018 and 30th November 2018 notwithstanding the fact that Raju and I were and continue to be in the midst of multiple litigation matters. I exhibit hereto marked **SK-1a** and **SK-1b** for identity the formal orders of Master R. Harris and C. Beckford J. detailing the said payment arrangements." (emphasis as in original)

[67] This evidence is in stark contrast with paragraph 11 of the affidavit of Raju Khemlani filed on 8 May 2018 where he stated:

> "That I would also ask that the enforcement of the Final Costs Certificate dated the 24th day of October 2017 be stayed pending the determination of the appeal filed herein. It is that final costs certificate that is the subject matter of this appeal. If the said order is enforced I will be compelled to pay sums which are being disputed, and which have not yet been settled definitively, and I may have great difficulty recovering the said funds from the Respondent as in the past the Respondent has created great difficulty for the Bailiff who has tried to collect sums from him pursuant to an Order for Seizure and Sale which order was returned nulla bona."

[68] It was on the basis of the above paragraph and in particular the return of the order for seizure and sale "nulla bona" that it was argued that there was a risk of injustice to the appellant. It was also argued that in the absence of a stay the applicant "is subject to further taxation and consequential enforcement proceedings in the form of Judgment Summons and committal proceedings. When compared to the prejudice if any to the Respondent which at the highest is a delay in the payment of the costs which attract interest in any event, it is submitted that the prejudice to the Applicant is greater, particularly when the sums being sought are in excess of Five Million Dollars ($5,000,000.00) which is not a nominal sum by any assessment. The assessment is likely to significantly reduce the sum to be paid".

[69] On the evidence it is clear to me that these parties are involved in a multiplicity of litigious matters. Each has had to be paying costs to the other.

[70] It should be remembered that the ordinary course is that an appeal does not operate as a stay of execution. It means that, barring the risk of injustice, monies ordered to be paid by the court should be paid even while an appeal is pending. In those circumstances grounds 12 and 16 of the application are not convincing.

[71] The argument of a risk of injustice to the applicant is rendered even less convincing in light of the fact that the issue in the appeal does not concern liability to pay the costs. Instead, it is a matter of the quantum of the costs. The affidavit evidence of Suresh Khemlani has also shown that it is indeed possible to secure payment from him. He has made arrangements to pay and has in fact paid costs due to the applicant in previous proceedings.

Conclusion

[72] Therefore, I see no basis on which to conclude that the appeal would be rendered nugatory should a stay not be ordered, particularly in light of the fact that what is in question is quantum and not liability. In addition, there is no risk of injustice to the appellant in the circumstances outlined. On the other hand, in all the circumstances, it would be unjust to, as requested by the applicant, stay the obligation of the appellant to pay the relevant costs due to the respondent.

[73] As outlined above, the grounds of the application in so far as they referred to the need to stay taxation proceedings in respect of the costs flowing from Sykes J's order were also overtaken by the fact that the taxation in fact took place.

[74] Upon assessing the affidavit evidence, the law and the grounds of the application it was my view that the position which was least likely to produce injustice between the parties was for no stay of execution to be ordered.