

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO COA2019APP00169

**BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE STRAW JA**

BETWEEN	ADS GLOBAL LIMITED	APPLICANT
AND	FLY JAMAICA AIRWAYS LIMITED	RESPONDENT

Kent Gammon instructed by Kent Gammon & Associates for the applicant

KD Knight QC, Miss Stacey Knight and Miss Ashleigh Ximines instructed by Knight, Junior & Samuels for the respondent

9, 13, 18 March and 3 April 2020

BROOKS JA

[1] I have read, in draft, the reasons for judgment of McDonald-Bishop JA and agree that her reasoning and conclusion accords with my own in respect of the orders that this court made on this application.

MCDONALD-BISHOP JA

[2] This is an application brought by ADS Global Limited ("ADS Global") to vary/discharge the order of P Williams JA that she made in chambers, while sitting as a single judge of this court on 24 July 2019. The application also includes an application for a stay of execution of the order of Edwards J (as she then was), made in the

Commercial Division of the Supreme Court on 20 December 2018, in favour of the respondent Fly Jamaica Airways Limited ("Fly Jamaica"). P Williams JA and Edwards J will be interchangeably referred to as, "the learned single judge" and "the learned trial judge", respectively.

[3] P Williams JA refused ADS Global's application for a stay of execution of the judgment of Edwards J, in these terms:

"In determining whether to grant this application for a stay of execution, I am obliged to consider whether there is merit in the appeal and whether the granting of the stay is the order that is likely to produce less injustice between the parties.

On the material presented at this time, I cannot say whether the judge did in fact fail to consider the matters of which the applicant has complained. Further, the applicant has not sufficiently demonstrated the basis for his assertions that the judge has erred in the manner he says.

Although he has shown the potential harm he will suffer on this material I am not satisfied that the stay will produce less injustice to him when balanced against the respondent.

In the circumstances, the amended notice of application for a stay of execution filed 22 May 2019 is refused."

[4] On 18 March 2020, after hearing arguments from counsel, we made these orders:

"(1)The order of P Williams JA made on 24 July 2019, refusing a stay of the execution of the judgment of Edwards J made on 20 December 2018, in the Commercial Division of the Supreme Court, is discharged.

(2) Order number 4 of the said judgment of Edwards J, awarding damages to Fly Jamaica for breach of the

Provision of Services Agreement in the sum of US\$4,283,960.00 with interest thereon at 6% from 20 December 2018 until payment, is stayed from the date hereof until the determination of the appeal or until further orders.

(3) The stay of execution of the judgment of Edwards J is granted on condition that within 30 clear days of the date hereof, ADS Global shall provide security in the sum of Twenty Five Million Jamaican Dollars (\$25,000,000.00) by either payment of the whole or a part of the said sum into court and/or by way of a letter of undertaking from a recognised financial institution to pay, on demand of the court, the said sum of Twenty Five Million Jamaican Dollars (\$25,000,000.00) or any balance not paid into court, pursuant to this order.

(4) Costs of this application shall be costs in the appeal.

(5) There shall be liberty to apply for any further order which may be necessary to give effect to the order of this court."

[5] We promised then to give our reasons in writing at a later date. This is in fulfilment of that promise.

The background

[6] A synopsis of the background facts leading to the claim in the Supreme Court should prove useful. The salient facts are as follows: In 2012, ADS Global and Fly Jamaica executed between themselves several contracts for the provision of varying types of services. Under two of the contracts, ADS Global was acting as an agent for a third party, Columbus Communications Jamaica Limited, then trading as Columbus Business Solutions. Those two contracts were: (i) a 1/2 SIP Truck and Direct Inbound Dial Business Agreement; and (ii) a 10MB Fibre Direct Dedicated Internet Agreement.

These contracts were for the provision of telephone and internet services to Fly Jamaica. Under a third contract, the Provision of Services Agreement, ADS Global on its own behalf, provided call centre services to Fly Jamaica.

[7] The three contracts were executed on separate dates between March and December 2012, without any cross-referencing to each other. The parties began the performance of the agreements on several dates as and when needed and ADS Global would send separate invoices to Fly Jamaica for payment for the services provided. Fly Jamaica made payments in specific amounts which corresponded to the sums due on specific invoices. Fly Jamaica received periodic statements from ADS Global, which indicated which invoices, if any, were outstanding. At some time during the relationship, Fly Jamaica fell into arrears with payments on several invoices.

[8] On 15 May 2014, ADS Global sent a notice to Fly Jamaica indicating that services would be terminated or suspended for non-payment. However, upon Fly Jamaica's assessment of the statements, it was found that the invoices for the phone and internet services had been paid. As a result, Fly Jamaica pointed out to ADS Global that only the call centre services could have been lawfully suspended.

[9] On 18 May 2014, ADS Global disconnected the call centre services and on 20 May 2014, disconnected the telephone and internet services, purportedly, based on non-payment of invoices by Fly Jamaica. At the time of the suspension of the services, Fly Jamaica was querying seven of the invoices which were sent to it for payment and in relation to five others, it asserted, that they were sent to it after the suspension of its

services. Fly Jamaica refused to pay the sums demanded by ADS Global on the invoices in dispute, even after the services were disconnected.

Proceedings in the Supreme Court

[10] ADS Global filed its claim in the Supreme Court alleging, among other things, that Fly Jamaica was in breach of all three contracts based on the non-payment of the invoices it had sent to it for payment for the services rendered. It contended that its policy was to apply all payments to the oldest invoices. ADS Global asserted that the payments that Fly Jamaica made on 2 and 21 May 2014 for telephone and internet services were applied to the oldest invoices, which were call centre invoices.

[11] Fly Jamaica's response was that the agreements were separate, independent agreements and that ADS Global had no basis on which to apply the payments made on specific invoices under one contract to invoices issued under another contract. Fly Jamaica brought a counterclaim against ADS Global for damages for breach of contract, which it alleged emanated from ADS Global's suspension of all services provided to it.

[12] From the issues joined between the parties on ADS Global's claim for breach of contract, Edwards J identified six subsidiary issues for her determination in resolving the principal issue of whether Fly Jamaica had breached the three contracts. The issues were:

- i. whether the three contracts were separate independent contracts;

- ii. whether Fly Jamaica had a 15 or 30 days' credit period under the agreements with ADS Global;
- iii. whether there were any outstanding invoices for telephone or internet service at the time those services were disconnected;
- iv. whether the call centre invoices were disputed by Fly Jamaica in accordance with clause 4.3 of the Provision of Services Agreement;
- v. whether ADS Global had the right to suspend all services due to non-payment of invoices under the Provision of Services Agreement; and
- vi. whether all three agreements were repudiated by Fly Jamaica when it refused to pay outstanding and future invoices.

[13] On those issues that touch and concern the question of liability on ADS Global's claim, Edwards J made the following findings:

- i. Issue 1: On the terms of the agreements, the three contracts were separate and independent.
- ii. Issue 2: Fly Jamaica had a net 15 days' credit period after receipt of the invoice.
- iii. Issue 3: There were no outstanding payments on invoices for internet and telephone services. There was also no contractual basis

for ADS Global to apply payments to the oldest invoices rather than to specific invoices.

- iv. Issue 4: Fly Jamaica did not dispute the call centre invoices in accordance with the requirements of the contract. A verbal dispute of the invoices was not sufficient, and there was no notice of the dispute as required.
- v. Issue 5: ADS Global had no right to suspend all services due to non-payment of invoices. ADS Global's apportionment of payment for telephone and internet services to the invoices for call centre services, which was provided under a separate contract, was a breach of contract on its part. The suspension of telephone and internet services, as a result, also constituted a breach.
- vi. Issue 6: Fly Jamaica did not repudiate all three contracts when it refused to pay outstanding and future invoices. It queried the invoices, which it had a right to do. Fly Jamaica had not taken any of the steps prescribed by any of the contracts for its termination.

[14] On Fly Jamaica's counterclaim, the single issue (issue 7) of whether ADS Global had breached the contracts, thereby entitling Fly Jamaica to damages, was answered in the affirmative in favour of Fly Jamaica.

[15] Following the above factual findings, Edwards J made these orders on the claim and counterclaim:

“1. On [ADS Global's] claim for damages for breach of contract for failure to pay outstanding invoices with respect to the 10MB Fibre Direct Dedicated Internet Agreement and ½ Sip Trunk and Direct Inbound Dial Business Agreement, [ADS Global's] claims fail.

2. On [ADS Global's] claim for damages for breach of the terms of the Provision of Services Agreement for failure to pay outstanding invoices, [ADS Global] succeeds. [Fly Jamaica] to pay to [ADS Global] the total found due on the outstanding invoices up to 18 May 2014 under the Provision of Services Agreement namely; 14319, 14327, 14333, 14334, 14336 and 14349, with interest at the commercial rate of 12% per annum from 4 May 2014 to 20 December 2018 and at a rate of 6% thereafter, until the date of payment.

3. [ADS Global's] claim to be entitled to payment after the date of termination of services, as damages for breach of contract, fails.

4. Judgment for [Fly Jamaica] on the counterclaim for breach of the Provision of Services Agreement, the 10MB Fibre Direct Dedicated and the 1/2 SIP Trunk and Direct Inbound Dial Business Agreement. No damages awarded for breach of the 10MB Fibre Direct Dedicated Internet Agreement as no loss was proved. Damages awarded for breach of the Provision of Services contract in the sum of **Four Million Two Hundred and Eighty-Three Thousand Nine Hundred and Sixty United States Dollars (US\$4,283,960.00)** with interest at 6% from 20 December 2018 to the date of payment.

5. Each party to bear their own costs.” (Emphasis as in original)

[16] ADS Global met with only partial success on the claim. Fly Jamaica succeeded on its counterclaim.

The appeal

[17] ADS Global is aggrieved by orders one, three and four of Edwards J. On 28 January 2019, it filed its notice and grounds of appeal in this court, which was amended and re-filed on 22 May 2019. The amended notice of appeal detailed about 18 grounds of appeal alleging errors of facts and law on the part of the learned trial judge, both in relation to liability and damages. ADS Global is seeking orders on appeal, which include the setting aside of the order that was made in favour of Fly Jamaica on the counterclaim.

[18] Order number four evoked the most significant concern on the part of ADS Global. Consequently, by an amended notice of application filed on 22 May 2019, it sought, from this court, a stay of execution of the judgment.

[19] This amended application along with the affidavits in support of it was considered by P Williams JA on 24 July 2019, on paper in chambers. It was then that the order under review in these proceedings was made.

The application to vary/discharge order of a single judge and for a stay of execution

The legal framework

[20] The application to vary/discharge the order of P Williams JA and for a stay of execution to be granted, pending the determination of the appeal, is grounded in rule 2.11 of the Court of Appeal Rules, 2002 ("the CAR"). That rule empowers the court to vary or discharge the order made by a single judge in chambers. It does not, however, state the circumstances under which, or how, this power should properly be exercised.

What is clear, is that the exercise of the power is subject to the overriding objective of the CAR to deal with the case justly.

[21] Further guidance, relating to the exercise of the power, is also gleaned from authoritative dicta from decided cases which have been consistently followed in this jurisdiction. In this regard, **Hadmor Productions Ltd v Hamilton** [1983] 1 AC 191 and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, are particularly noted. These cases have laid down the guiding principles which delineate the parameters of review by an appellate court in treating with the exercise of discretion by a judge dealing with a matter at first instance. Fundamentally, the authorities have made it absolutely clear that the appellate court must defer to a judge's exercise of his discretion and must not interfere merely on the basis that it would have exercised the discretion differently. The prescribed standard of review has been applied to the consideration of this case.

[22] It is also recognised that a consideration of the question of whether this court should disturb the decision of P Williams JA must, ultimately, be informed by the legal principles applicable to an application for stay of execution.

[23] The law governing a stay of execution of a judgment is well-settled and, by now, fast becoming trite. There is, therefore, no need for any detailed exposition on the applicable law. It suffices to say that the liberal approach laid down by Phillips LJ in **Combi (Singapore) Pte Limited v Ramnath Sriram and another** [1997] EWCA 2164, has been consistently adopted and applied by this court. See, for instance,

Kenneth Boswell v Selnor Developments Limited [2017] JMCA App 30. The proper approach, according to Phillips LJ in **Combi** is for the court to make the order which best accords with the interests of justice, once the court is satisfied that there may be some merit in the appeal.

[24] In **Calvin Green v Wynlee Trading Ltd** [2010] JMCA App 3, Morrison JA (as he then was), having had regard to previous authorities, including, the well-known authority of **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065, stated that the threshold question on these applications is whether the material provided by the parties discloses at this stage an appeal with some prospect of success. Once that is so, the court is to consider whether, as a matter of discretion, the case is one fit for the grant of a stay, that is to say, whether there is a real risk of injustice, if the stay is not granted or refused.

Whether the order of single judge should be varied/discharged

[25] The fundamental contention of ADS Global, as deduced from the evidence and submissions advanced in support of the application, is that P Williams JA erred when she found that the appeal has no merit on the material before her, and that there was no greater risk of injustice to ADS Global if the stay was refused than there would have been to Fly Jamaica, if granted.

[26] In pointing to the merit of the appeal which would satisfy the threshold test of being arguable with some prospect of success, Mr Kent Gammon, in oral arguments, directed the court's attention, only to grounds of appeal g, h, i, and j, although not

contending that the other grounds are without merit. He argued that on the strength of these grounds alone, ADS Global has an appeal with some prospect of success, which would entitle it to a stay. These four grounds challenge the assessment and quantum of damages. They read:

- "g. The learned judge erred in law when she assessed damages for USD\$4,283,960.00 based on an expert report which used data for a call centre located in Guyana for a period mostly outside of the material contract period and which was admitted by the expert as inaccurate and based entirely on speculation.
- h. The learned [sic] erred in law when she awarded USD\$4,283,960.00 which was a cumulative assessment of all the revenue booking channels of [Fly Jamaica] which was indicated at paragraph 2.4 of the expert's report. The following are the revenue channels used by the expert for Fly Jamaica.
 - i. Airport Ticketing Office
 - ii. Corporate Headquarters
 - iii. Customer Service-Kingston
 - iv. Travel Agent-Jamaica
 - v. Reservation Call Centre-Montego Bay (Formerly controlled)

That it was not the evidence that the revenue channel listed under i-iv fell under the Provision of Services Agreement.

- i. The learned judge erred in law when she awarded damages for USD\$4,283,960.00 based on the aforesaid expert report which was wholly and manifestly excessive and based on no financial evidence whatsoever of [Fly Jamaica] as to its earnings or expenses in operating an airline with one aircraft for the period of five (5) months up to the

date of suspension of the Provision of Services Contract.

- j. The learned judge erred in exercising her discretion of attaining the overriding objective of justice in that she failed to conduct a fair and proper balancing exercise between the parties with a view to dealing with the cases justly between the parties when she granted an amendment to [Fly Jamaica's] pleading after the trial was underway and tailored after the learned judge has made several comments on the evidence while refusing [ADS Global's] application to amend their pleadings to add eight (8) invoices inadvertently left off and as testified by [ADS Global's] witness which she described as being made in bad faith and moreso when all twenty (20) invoices had been addressed by [Fly Jamaica] in one of their witness statements, namely that of Mrs Andrea Ramtallie."

[27] ADS Global contended that the award of damages is, "substantially high such as to constitute an erroneous estimate of what Fly Jamaica is entitled to". One of the reasons highlighted by Mr Gammon, for what he called the "substantially high" award, is that no account was taken of the expenses incurred by Fly Jamaica in earning the revenue or income referenced in the expert report on which Edwards J relied to make the award. In failing to take into account expenses, counsel argued, the learned trial judge would have over-compensated Fly Jamaica in making an award of gross earnings.

[28] ADS Global also complained that Edwards J had failed to take into account that the parties had agreed a reasonable period during which Fly Jamaica could have made alternative arrangements to mitigate any loss on the breach, which was a 30 day period as provided for in the contract. In the light of this, counsel argued, Edwards J erred in assessing the damages on the basis of the remaining term of the contract. Counsel also highlighted, as a point of concern, that Edwards J, having acknowledged that Fly

Jamaica had made alternative arrangements to mitigate the fall-out from the breach, did not state the date those arrangements were made and how that impacted the extent of the loss.

[29] These matters, ADS Global contended, ought to have been considered by P Williams JA in her evaluation of the merits of the appeal, and her failure to do so amounted to an error in law, which would provide a basis for this court to interfere with the exercise of her discretion.

[30] ADS Global further contended that there is a risk of injustice to it in paying over the judgment sum to Fly Jamaica in the circumstances where the appeal has a realistic prospect of success. It relied on the evidence of ADS Global's Chief Operating Officer and Director, Mr John Spencer, and that of its counsel, Mr Gammon, as set out in affidavits filed in support of the applications. ADS Global, through that evidence, sought to demonstrate that there is a real risk of injustice to it if the stay is not granted and the funds are paid to Fly Jamaica before the appeal is heard.

[31] In summary, the following represents the gravamen of ADS Global's contention that there is a real risk of injustice to it and less injustice to Fly Jamaica.

- i. the payments will detrimentally affect ADS Global's operations, and the survival of the company would be severely jeopardised if it were to pay the judgment debt.

- ii. there is a risk that if the sums were paid to Fly Jamaica, and ADS Global is successful on the appeal, the sum paid out will not be recovered as Fly Jamaica has ceased operations and is in a precarious financial position, which is likely to lead to bankruptcy.
- iii. without a stay of execution, ADS Global will be ruined, and the appeal will be rendered nugatory.
- iv. The only risk to Fly Jamaica is that there would be a delay “in them reaping the fruits of their successful litigation”.

[32] ADS Global’s insistence before this court that a greater risk of injustice lies in refusing the stay than in granting it is interpreted to mean that it is saying that P Williams JA was wrong when she found otherwise and, so, would have failed to exercise her discretion judicially when she refused to grant the stay.

[33] The application was vehemently opposed by Fly Jamaica, who through its counsel, Mr KD Knight QC, with the support of written submissions from Miss Stacey Knight and Miss Ashleigh Ximines, contended that P Williams JA was correct when she refused to grant the stay. According to learned Queen’s Counsel, in presenting the arguments for Fly Jamaica, the appeal has no prospect of success because Edwards J, in a detailed, thorough and well-reasoned judgment, made findings of fact, which cannot be said to be plainly wrong.

[34] In respect of damages, Mr Knight noted that Edwards J had relied on the expert report presented to her, and that it was for her to decide what she accepted or rejected. There was, he said, no reason placed before Edwards J for her to reject the expert's evidence. Of note too, he said, was the fact that she had exercised due care in adopting not only a mathematical approach but also a forecast approach. In doing so, she awarded damages on the lower side of the range, which had been presented by the expert. Learned Queen's Counsel argued that the award she made is not likely to be disturbed. P Williams JA, he submitted, was, therefore, correct to find, on what was presented to her, that there was no prospect of success in the appeal.

Prospect of success of the appeal

[35] This court is not required at this stage to delve in detail into the grounds of appeal and to disclose its thinking on all aspects of the appeal. Since the grounds of appeal may be found to have varying degrees of success, upon a preliminary assessment, the court need only to be satisfied that, at least, one ground of appeal is arguable with some prospect of success.

[36] It is evident from the brief reasons for the decision of P Williams JA that she did not have all material facts before her when she made her decision refusing the stay. She did not have Edwards J's written reasons for judgment nor the notes of evidence taken at the trial. P Williams JA would have only considered the affidavit evidence presented by ADS Global in support of the application. There was also no explanation for the absence of the written judgment before P Williams JA, but that does not bar this court from having regard to it. It is important to do so in the interests of justice. See

Royden Riettie v National Commercial Bank Jamaica Limited and others

[2014] JMCA App 36, which discusses the unreported decision of the Privy Council in

John Ledgister and another v Jamaica Redevelopment Foundation Inc JCPC

2013/0108, delivered 16 July 2014. Their Lordships accepted the views expressed by

Phillips JA, in her dissenting judgment in **John Ledgister and Another v Jamaica**

Redevelopment Foundation Inc [2013] JMCA App 10.

[37] This court has had the benefit of the written reasons for judgment of Edwards J and the submissions of both parties, which have proved quite helpful. To date, the notes of evidence have still not been made available to this court. However, the court has to do the best it can in the circumstances. As Mr Gammon said, whether there is merit in the appeal must be evaluated by having regard to the evidence presented at trial as well as the reasoning and conclusions of the trial judge. The judgment of Edwards J is very detailed and provides a clear picture of the material evidence that was led before her on the central issues. There is no suggestion that she misquoted any evidence or failed to mention any critical aspects of the evidence.

[38] Mr Gammon identified those grounds on which he maintains ADS Global stands a clear and reasonable chance of success on the appeal. These relate to the approach of the learned trial judge with regard to the assessment of damages, the basis of quantification and the quantum awarded. He pointed out that the judgment does not reflect any deduction made for operational and other expenses which would have been incurred by Fly Jamaica during the period for which the award was made.

[39] Having examined the grounds of appeal, mainly those touching and concerning the damages as highlighted by ADS Global, I was led to the view that the appeal is not devoid of merit as concluded by P Williams JA. In coming to her conclusion, P Williams JA did not indicate what aspect of the case she had taken into account in forming that view in the absence of Edward J's written reasons for judgment and the notes of evidence.

[40] The learned trial judge awarded what appears to be a gross sum representing Fly Jamaica's loss of revenue or sale for a period of 10 months. She did not demonstrate that she had considered any corresponding expenses that Fly Jamaica would have incurred in earning the revenue that she found to have been lost for the 10-month period. Fly Jamaica had operational costs that it would have had to meet from its revenue, had the breach not occurred. Some of those were payable to ADS Global, itself, such as for the call centre service along with the internet and telephone services.

[41] There is nothing in Edwards J's judgment which indicates that those matters fell within the terms of reference of the expert witness on whose evidence Fly Jamaica relied. As Edwards J, herself, stated, the role of the expert was to "forecast the loss of revenue" from the sale of airline tickets, and that was exactly what the expert did. Edwards J had not demonstrated in her reasoning that she had made an appropriate discount to reflect a true picture of the likely or estimated profit that would have been lost to Fly Jamaica, consequent on the breach, thereby fairly and reasonably putting it in the position it would have been in, had the breach not occurred.

[42] The question of whether the sum awarded, based as it seems to be on gross revenue, without any allowance made for deductibles, is reasonable and fair, looms large for an enquiry by this court. It cannot be said with any conviction that the award of damages is not inordinately high and not an erroneous estimate of Fly Jamaica's loss resulting from the breach.

[43] The other questions raised on the grounds of appeal in focus, relate to Edwards J's bases for the quantification of the award of damages and the reliability of the data on which the award was based.

[44] P Williams JA stated that on what was before her, "she could not say whether Edwards J "did in fact" fail to consider the matters of which ADS Global complained. It means from this that the learned single judge made no definitive finding one way or the other as to whether, for instance, Edwards J took all pertinent matters and principles of law into account in arriving at the damages awarded. The learned single judge would have only been able to determine whether Edwards J "did in fact" fail to consider the things complained of, by an examination of the written judgment. The absence of the written judgment for her to make that determination was, regrettably, to the detriment of ADS Global.

[45] By failing to take into account that the award of damages was seemingly made on gross, as distinct from, net earnings or profit, P Williams JA would have failed to take into account a relevant consideration in her evaluation of ADS Global's prospect of success on appeal.

[46] The question of whether Edwards J was correct to apply the expert evidence of estimate of loss in sales, without any apparent adjustments made for actual or estimated expenses, which would have been incurred by Fly Jamaica during the period for which the award was made, is a very live one for the investigation of this court. ADS Global has satisfied the first limb of the two-step test, and so, it cannot be concluded that the decision of P Williams JA, which was partly based on her finding that there was no merit in the appeal on the material that was before her, should be allowed to stand.

Risk of injustice

[47] P Williams JA also found that although ADS Global had shown the potential harm it would suffer, on the material before her she was not satisfied that the stay would produce, "less injustice to [it] when balanced against [Fly Jamaica]". It seems that she actually meant to say, "more injustice" than "less injustice". Be that as it may, ADS Global contended that P Williams JA erred in that regard, leading to an improper exercise of her discretion. According to Mr Spencer in his affidavit evidence, ADS Global is greatly affected by order number four of the judgment of Edwards J. He deposed that the award of damages has attracted publicity, which caused it to be bombarded with several demands from Fly Jamaica's creditors for payment of invoices owed by Fly Jamaica. The publicity, he deposed, has caused considerable damage to ADS Global's reputation.

[48] Mr Spencer also highlighted the financial problems of Fly Jamaica and the fact that it has ceased operations. This argument of Fly Jamaica's financial standing was used to highlight the point that if the judgment is allowed to be enforced before the

appeal is heard, and ADS Global subsequently succeeds on the appeal, Fly Jamaica would not be in a position to repay the judgment sum. ADS Global, to bolster its arguments, relied on media reports of the crash of Fly Jamaica's plane in Guyana and pending lawsuits filed against Fly Jamaica in Canada.

[49] Mr Spencer also deposed that ADS Global is a significant employer of labour in Jamaica and that given the precarious position that it is in, any extraordinary expenditure at this time would, "severely jeopardise [its] survival".

[50] P Williams JA did not indicate the considerations which she took into account in balancing the injustice between the parties, given that she had no affidavit evidence from Fly Jamaica, in response. The only principle that would have enured to the benefit of Fly Jamaica is that it has a judgment in its hand, which, in itself, is something of value, and which ought not to be treated lightly. Fly Jamaica is, therefore, entitled to the fruits of its judgment without delay and should not be deprived of it unless for clear and compelling reasons.

[51] As there is some prospect of success in the grounds that the award of damages is inordinately high, it would be unfair to allow the judgment to be enforced for the full sum awarded. This is particularly so, in the light of the precarious financial position of Fly Jamaica. ADS Global has deposed that Fly Jamaica is unlikely to be in a position to repay the judgment sum if it or any sum is paid over, and the appeal succeeds. There is nothing from Fly Jamaica that would serve to dispel this concern.

[52] It does appear that P Williams JA's failure to find merit in the appeal led her to conclude that no greater injustice would be caused to ADS Global than to Fly Jamaica if the stay was not granted. She had not indicated any other reason for forming this view. So, it cannot be said with any degree of conviction that she took all relevant considerations, pertinent to the question of the risk of injustice, into account.

[53] This court would, therefore, be justified in interfering with her decision. The decision must be set aside, and this court considers the application for a stay afresh, having regard to all the circumstances of the case as disclosed to this court.

Whether the stay should be granted

[54] Having assessed the grounds of appeal against the background of the evidence, the reasoning of Edwards J, the law and the submissions of counsel for the parties, I am propelled to the view that there is some prospect of success in the appeal, even if it is only concerning the grounds challenging damages. The appeal is not all devoid of merit, as P Williams JA, seemingly, found.

[55] ADS Global has presented evidence to this court which sufficiently established, on a preponderance of probabilities, that there is a real possibility that Fly Jamaica will not be in a position to repay the sum it would receive in satisfaction of the judgment, if the execution is permitted before the appeal is heard, and ADS Global succeeds, even in part. The appeal would be rendered nugatory. It is, therefore, established on the evidence presented by ADS Global that there is a greater risk of irreparable harm to it if

the stay is refused and the execution of the judgment is allowed to proceed, than to Fly Jamaica if it is granted and there is a delay in execution.

[56] The submissions of counsel for Fly Jamaica that the application for the stay be refused cannot be accepted in all the circumstances. The grant of the stay is the course least likely to produce injustice.

Whether the stay should be conditional or unconditional

[57] Even in granting the stay, the court still must act in the interests of justice. It is mindful that Fly Jamaica, regardless of its financial predicament, is entitled to its judgment, which is something of immense value to it. At the same time, ADS Global must not be denied access to the machinery of the court to vindicate its rights to the fullest extent of the law in the light of the finding that its appeal is not devoid of merit.

[58] The court must, however, have regard to the risk that Fly Jamaica could be unable to enforce the judgment if the appeal should fail and it is entitled to the sum awarded. ADS Global had not presented itself as an entity that is in a position to pay the amount awarded. It indicated that it is jeopardised by the award and that it could face ruin as a result of the judgment. It means then, that there is a risk that if the appeal fails, it too could have difficulty satisfying the judgment debt.

[59] The need to deal with the case justly dictated that the stay be granted on condition, but not one that is so onerous that would have the effect of stifling the appeal. It was considered apt for ADS Global to give security for the grant of the stay to offer some measure of protection to Fly Jamaica.

[60] It is difficult, in the absence of any information concerning the costs incurred by Fly Jamaica in earning its income, to decide on a figure that would represent reasonable security. Also, ADS Global has not given any assistance in this regard as it has provided no concrete evidence of its own financial affairs. The security chosen cannot be a paltry sum, given the judgment debt, but it cannot be a large sum as to render the order for security unattainable, with the undesirable result that the appeal is stifled. I formed the view that security in the sum of \$25,000,000.00 seemed reasonable.

[61] It was for the foregoing reasons that I concurred in the decision of the court that the stay should be granted upon terms as detailed at paragraph [4] above.

STRAW JA

[62] I, too, have read in draft the reasons for judgment of McDonald-Bishop JA and agree also that these reasons accord with my own in respect of the orders made at paragraph [4] above.