[2013] JMCA App 29

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 12/2013

APPLICATION NO 14/2013

BETWEEN	**CARIBBEAN CEMENT COMPANY LTD**	**APPLICANT**
A N D	**FREIGHT MANAGEMENT LIMITED**	**RESPONDENT**

Emile Leiba and Miss Gillian Pottinger instructed by DunnCox for the applicant

Mrs Susan Risden-Foster and Mrs Trudy-Ann Dixon Frith instructed by Grant Stewart Phillips & Company for the respondent

4, 5 June and 2 October 2013

IN CHAMBERS

LAWRENCE-BESWICK JA (Ag)

[1] On 8 July 2005, Freight Management Limited (FML) instituted a claim against Caribbean Cement Company Limited (CCCL) for damages and/or compensation based on either a breach of contract and/or promissory estoppel. The trial

commenced on 24 September 2012 and continued over several days until 24 January 2013 when Sinclair Haynes J, delivered a judgment in favour of FML. On 11 February 2013 CCCL filed a notice appealing the judgment and also this notice of application for stay of execution of the judgment pending the determination of the appeal.

Background

[2] In August 2002 CCCL invited tenders for the transportation of cement by sea from its plant in Rockfort, Kingston to its warehouse in St James. FML submitted a tender to CCCL and maintains that it was verbally advised that it was accepted. FML signed a contract document which was attached to the tender document and submitted it to CCCL but it was never signed by CCCL. CCCL for its part regarded FML as the preferred bidder. Both parties meanwhile discussed details of the transportation, including pricing.

[3] Based on its understanding of the discussions, FML moored a vessel at the Rockfort Pier of CCCL on 7 July 2003, and it remained there until 6 October 2003 when CCCL informed FML that it was no longer interested in transporting the cement by sea. During that time the vessel left the pier for two brief charters and returned.

[4] FML thereafter filed suit to recover damages for what it initially claimed to be mobilization costs of the vessel and general damages for loss of contract. Later during the trial, it amended the claim to be one for damages for loss of use of the vessel

during the period whilst it was moored at CCCL's pier.

[5] The judgment which Sinclair-Haynes J delivered on 24 January 2013 was in the following terms:-

> "1. Judgment for the Claimant in the sum of US$330,000.00.
>
> 2. Costs to the Claimant to be agreed or taxed.
>
> 3. Interest at the rate of 6% per annum awarded from the date of the service of the Claim Form to the 21st day of June 2006; and at the rate of 3% per annum from the 22nd day of June 2006 to the 14 day of December 2012.
>
> 4. Stay of execution of judgment granted for 42 days from the 14th day of December 2012.
>
> 5. Stay of execution of judgment extended and granted for a further period of 20 days from the 24th day of January 2013."

In her judgment, the learned trial judge indicated that FML had not justified its claim for loss of contract but she awarded a sum for loss of use of the vessel.

Submissions

[6] Mr Leiba, counsel for CCCL, submitted that the execution of the judgment should be stayed because CCCL's appeal has a good prospect of success and there is a greater risk of injustice to CCCL if it were not stayed, than there is to FML if it were stayed. Counsel accepted that if the execution of the judgment were not stayed it would not stifle the appeal. However, he pointed out, FML had not provided evidence of its means and ability to repay the judgment if CCCL paid the sum, succeeded on appeal and it

became necessary for FML to repay the amount. If the appeal succeeds, he argued, it would be difficult or costly to recover the judgment from FML.

[7] Mr Richard Lake, managing director of FML, had offered to give a guarantee for repayment, but counsel submitted that such a guarantee would not be enforceable since Mr Lake himself was not a party to the contract between CCCL and FML. He relied on **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065 to support his argument that if the company itself has insufficient funds to secure repayment, then the fact that the owners will stand behind the company to repay the debt does not rectify that situation. His submission was that a refusal to stay the execution of the judgment would therefore result in injustice to CCCL.

[8] Mrs Dixon-Frith, counsel for FML, countered that Mr Lake's guarantee would in fact be enforceable under the ordinary rules of contract. Her concern was that if the judgment were not executed pending the determination of the appeal, there was a likelihood that CCCL may go into liquidation and that it would not be able thereafter to satisfy the judgment debt. Additionally, the reasoning and findings of the trial judge were sound and therefore FML should not be deprived of the benefit of the judgment which had been in its favour.

The law

[9] An appeal does not operate as a stay of execution of the orders of the lower court (Court of Appeal Rule 2.14). However, discretion lies in the appeal court or the

lower court to order otherwise. The Court of Appeal Rules empower a single judge of the court to stay the execution of any judgment or order against which an appeal has been made, pending the determination of the appeal (rule 2.11 (1) (b)).

[10] In **Polini v Gray** 1873 P 162 and **Sturla v Freccia** [1879 12 Ch D 438] the court accepted the principle that it could suspend the declared right of a litigant, pending an appeal to the House of Lords, but warned that that discretion should be very carefully exercised so as not to encourage anyone to present an appeal for the mere purpose of delay. The wisdom of that warning is obvious.

[11] The principles guiding the exercise of the judge's discretion to stay the execution of a judgment have been examined by the courts in several authorities. In **Linotype-Hell Finance Ltd v Baker** [1992] 4 All ER 887, the Court of Appeal held that:

> "if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success that is a legitimate ground for granting a stay of execution." [Staughton LJ at p 888]

There the court regarded as being too stringent, the principle that had been enunciated in the 19th century in **Atkins v Great Western Railway Co** 1886 TLR 2 400, that the only ground for staying the execution of a judgment was if there were evidence that if the damages and costs were paid there was no reasonable probability of getting them back if the appeal succeeded.

[12] In **Flowers Foliage and Plants of Jamaica Ltd et al v Jamaica Citizens**

Bank Limited SCCA No 42/1997 delivered 29 September 1997, the Court of Appeal of Jamaica approved of the principle as stated in **Linotype-Hell** and granted a stay of execution of the judgment. There, the court accepted that the applicant would be ruined financially if the judgment against her were not stayed and also accepted that there were triable issues which had not been determined in the judgment of the learned trial judge (page 10).

[13] In **Beverley Levy v Ken Sales Ltd** SCCA N0 81/2005 delivered 22 February 2007 Harris JA referred to **Flowers** and stated that any applicant seeking to have a judgment stayed must demonstrate that he has a realistic prospect of success on appeal and that he would be ruined if the stay is not granted. She referred to what she described as a general rule that a successful litigant should not be deprived of the fruits of his litigation whilst the appeal is pending (page 8). The learned judge of appeal refused to stay the execution of the judgment but imposed a condition on the respondent to repay the costs if required so to do, because the liabilities of the respondent and the value of their assets were unknown.

She stated that:

> "A court, taking into account all the circumstances of the case, ought to conduct a balancing test by weighing up the intrinsic dangers in granting or refusing a stay." (page 9)

The learned judge of appeal referred to **Hammond Suddard Solicitors** where Clarke LJ said:

> "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." (par.22)

[14] In **Jamalco (Clarendon Alumina Works) v Lunette Dennie** [2010] JMCA App 25 McIntosh JA (Ag) (as she then was) examined some of the current authorities including **Linotype-Hell** and **Flowers** and stated that she had found "no authority establishing that the ruin approach is to be followed to the exclusion of other legitimate grounds" (para [42]). The learned judge of appeal concluded that:

> "[f]inancial ruin or inability to repay the judgment sum on a successful appeal, after enforcement, are but factors for consideration in seeking to determine where the justice of the particular case lies." [par.42]

[15] In that case the learned judge granted the stay of execution based, *inter alia*, on her findings that the applicant had some prospect of success in its appeal, and that there was a greater risk of injustice to the applicant than to the respondent if the stay were refused as there was a real risk that the appeal would be rendered nugatory (at para [48]). She accepted as true, the affidavit evidence that there was a risk that the respondent would be unable to repay the judgment sum if it were paid to her and she were required to repay it if the applicant were later successful in its appeal. At the time of the application, the respondent, a subsistence farmer, was not earning an income from her occupation.

[16] These authorities show that in determining whether to grant or refuse an application for the stay of execution pending appeal, the court should consider (i)

where the interests of justice lie and that (ii) the respondent should not be unduly deprived of the fruits of his successful litigation. Further, in determining where the interests of justice lie, consideration must be given to:

(a) The applicant's prospect of success in the pending appeal.

(b) The real risk of injustice to one or both parties in recovering or enforcing the judgment at the determination of the appeal.

(c) The financial hardship to be suffered by the applicant if the judgment is enforced.

Prospect of success

[17] Counsel for CCCL argued that it was not merely some prospect of success which its appeal had, but rather, the prospect exceeded that required standard, and in fact had a good prospect of success because of the errors made by the learned trial judge. He submitted that the learned judge was incorrect in finding that a contract existed between CCCL and FML because, according to him, neither the price nor the date of commencement of the contract had been agreed between the parties (paras 118 to 120 of the judgment).

[18] In addition, he submitted that the judge had found that FML had failed to prove its damages for loss of contract (para 152 of the judgment) and she therefore had no basis on which to compute the damages she had awarded. Further, there had been no evidence as to the expenses which would have been incurred had the vessel undertaken a voyage during the relevant period, although such costs were available to CCCL. He argued that despite that, the judge used her own estimate of the cost of

operating the vessel and awarded damages for loss of use of the vessel for 60 days (para 152 of the judgment), thereby falling into error.

[19] Counsel argued further that the learned judge had misapplied the case of **Manhertz & Manhertz v Island Life Insurance Co. Ltd** SCCA No 24/2006 delivered 27 June 2008 (paras 137 to 139 of the judgment) in determining that promissory estoppel could constitute a cause of action and had therefore erroneously relied on the doctrine of promissory estoppel. Further, or alternatively, submitted counsel for CCCL, even if promissory estoppel constituted a claim, there was no, or no sufficient, evidence that CCCL had made a clear and unequivocal promise that it would not insist on its strict legal rights. In any event, even if there were an estoppel, on the evidence, the judge could only award nominal damages.

[20] Counsel continued further, that the learned trial judge had erred in disregarding certain vital documentary evidence provided by CCCL because the document had not been put to FML's witness to allow for a response/explanation to have been provided by the witness.

[21] On the other hand, counsel for FML, Mrs Dixon-Frith submitted that the finding that a contract existed between the parties could be supported on three independent grounds. Firstly, the course of dealings between the parties resulted in a contract. [**Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council** (1990) 1 WLR 1195]. Secondly, the request for bids gave rise to an obligation to act fairly. [**Pratt Contractors Ltd v Palmerston North City Council** [1995] 1 NZLR 469]. Counsel

argued in addition that nowhere in the tender documents did CCCL indicate that the acceptance must be written and therefore, the oral agreement must properly be regarded as a contract (**Manchester Diocesan Council for Education v Commercial and General Investments Ltd** [1970] 1 WLR 241).

[22] Mrs Dixon-Frith submitted that the learned trial judge's decision to find that the principle of promissory estoppel could be applied was supported by a plethora of authorities including **Scinto v London Borough of Newham** [2009] EWCA Civ 837 and **Amalgamated Investment & Property Co. Ltd (in liquidation) v Texas Commerce International Bank** [1982] 1 QB 84.

[23] Further, counsel contended, the decision of the learned trial judge to refuse to consider certain documentary evidence was fully supported by several authorities including the decisions in **Browne v Dunn** (1894) 6 R 67 and **Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation** (1983) 70 FLR 447 and more recently in the UK Court of Appeal decision in **Markem Corp v Zipher Ltd** [2005] EWCA Civ 267.

[24] As it concerns the award of damages, counsel for FML argued that although there was no evidence as to the operating costs of the vessel, the judge dealt with the matter fairly by reducing the figure claimed by one sixth and by bearing in mind that FML had mitigated its loss by undertaking two voyages while awaiting the loading of the cement.

[25] In this matter, the judgment of the learned trial judge contains decisions concerning the facts and also the law which can properly be the subject of worthwhile and robust arguments and which will require due deliberation as to their merits. It follows that, in my view, there is some prospect of success in the appeal by CCCL.

Risk of injustice

[26] CCCL has provided no evidence of any injustice which it may suffer if the execution of the judgment were not stayed, save for the possibility that the judgment debt could not be repaid by FML if CCCL succeeded on appeal and had already paid that sum to FML.

[27] In CCCL's annual returns filed in 2012, are details of a debenture to a Trinidadian company over CCCL's assets. The risk of injustice to FML, it is argued, lies in part in the possibility that CCCL could go into liquidation before the debt is paid. If execution were stayed, and CCCL went into liquidation and FML then succeeded on appeal, the debenture would take priority over the judgment debt. CCCL has not contested that suggestion.

[28] It is true that if the judgment were stayed, FML would be deprived of the immediate benefit of the fruit of its judgment which addressed a wrong it claims it suffered some 10 years before the judgment. At the same time, regard must equally be had to the interest of the applicant CCCL, who, having lost its case at the trial, is seeking to succeed on appeal so as not to be held liable to pay any sums to FML, and who wishes at the very least, to preserve any sum to which it may become entitled if it

were to satisfy the debt before the determination of the appeal and then succeed on the appeal.

> "[T]he principle which underlies all orders for the preservation of property pending litigation is this, that the successful party in the litigation, that is, the ultimately successful party, is to reap the fruits of that litigation, and not obtain merely a barren success." [**Polini** per Jessel MR at p 443]

[29] In this case, each party runs the risk of not receiving monies payable to it by the other, and each party has some prospect of success on the appeal. However, FML has already been adjudicated at the trial as being correct in its claim. In my view therefore, in these particular circumstances where the scales are otherwise evenly balanced between the parties, the risk of injustice seems to me to be slightly greater to FML than it is to CCCL.

Financial hardship of the applicant

[30] There is no evidence that CCCL would be in financial ruin if the judgment were enforced before the hearing of the appeal. There is, however, evidence on behalf of CCCL that if the judgment were enforced, it would face hardship. Miss Pottinger, counsel for CCCL, in her affidavit stated that CCCL does not have the liquid resources to satisfy the judgment and if it were enforced against its assets, that would impair CCCL's ability to control its operations and produce cement, which would impact negatively on Jamaica's construction industry. She asserted that CCCL's levels of sales and its working capital have declined, that it is unable to obtain a loan in its own name, and that it has had to depend on its parent company for support.

[31] Such evidence of CCCL's finances as has been exhibited, shows that CCCL's financial health is not sufficiently robust to cause full confidence in its ability to pay the judgment debt in the future, should its appeal fail. Indeed, each party runs the risk of itself not being able to immediately pay the judgment sum at the end of the appeal process if so required**.** The director of FML has provided evidence of his personal worth and of his willingness to guarantee payment by FML as necessary. However, I agree with the submission that if FML is unable to pay and the director reneges on his proposed commitment to repay the amount due, CCCL would have to rely on the principles of contract law and would have to commence additional proceedings in order to recover those amounts from the director who had not been personally a party to the proceedings. In my view, if CCCL were to succeed in its appeal, it ought not properly to be required to bear that additional burden, which would bring with it additional cost and delay in accessing the funds.

Analysis and discussion

[32] CCCL's counsel acknowledges that CCCL would not be ruined if it paid the judgment debt of US$330,000.00 but maintains the hardship would be great. It must be noted, however, that Miss Pottinger in her affidavit in support of the application for a stay of execution, does not purport to have personal knowledge of the financial status of CCCL but relies on information from the finance manager of CCCL as being accurate. It has long been established that the affidavit sworn to by a solicitor is not sufficient where the solicitor does not purport to have personal knowledge of the facts to which it

adverts (**Attorney General of Jamaica v John McKay** [2012] JMCA App 2). The practice of some attorneys-at-law of swearing affidavits in matters in which they appear as counsel is not to be encouraged. The potential embarrassment to counsel and to the court is obvious in the situation where the contents of the affidavit are vigorously challenged. Indeed, here, in his affidavit, Managing Director Mr Richard Lake of FML stated that he examined the public financial statements of CCCL and calculated that the judgment debt is approximately one day's sale or at most, less than two day's sales. If this is accurate, it is in stark contrast to counsel's affidavit and would support the view that payment of the judgment sum could not properly be regarded as causing hardship. Mr Lake's interpretation of the financial statements of CCCL which are available to the public is contrary to that of Miss Pottinger and shows a company which is capable of readily meeting the amount of the judgment debt.

[33] The audited financial statements for CCCL for 2011 as exhibited, state that any liability arising from the pending legal action in this claim is immaterial (page 66). Although the consolidated unaudited interim financial report for 31 March 2013 indicates that the group of which CCCL is a part, could not continue to operate without the financial support of its parent company, the directors are also reported there as having a reasonable expectation that the group will generate adequate cash flows and profitability which would allow the group to continue in operational existence in the foreseeable future.

[34] Based on the above, I have formed the view that there is no likelihood that if

CCCL were to pay the judgment debt it would suffer any hardship. However, one of the issues to be determined is if FML would be able to repay the monies to CCCL if the judgment were not stayed and then the appeal succeeded and the monies had to be repaid. There is indeed no evidence of the ability of FML itself to repay in those circumstances. It is, however, undisputed that Mr Richard Lake, as managing director of FML, has provided evidence of his personal means sufficient to secure the amount of the judgment on behalf of FML.

[35] The matter of the ability of an owner of a litigant company to guarantee repayment by the company came to be resolved in **Hammond Suddard**. There judgment had been entered in favour of **Hammond Suddard Solicitors** who had sued their former clients **Agrichem International Holdings Ltd** for unpaid fees. **Agrichem** appealed the judgment and sought a stay of several orders which had been made against it. **Agrichem**'s argument was that **Agrichem** was in such a poor financial position that if a stay were not granted and it had to pay **Hammond Suddard**, then it would not be able to pursue its appeal although it believed that its appeal had a real prospect of success. The appeal would effectively be stifled.
Lord Justice Clarke opined that "the evidence in support of an application for a stay needs to be full, frank and clear". (at para 14) The court regarded the evidence of **Agrichem's** financial situation as meeting none of these criteria.

[36] There was insufficient evidence to allow the court to assess the financial position of Agrichem. There was, however, an affidavit indicating that the owners were wealthy

and willing to stand behind the company, and that they had an interest in the appeal succeeding. Nonetheless, the court found that there was inadequate evidence to grant a stay (para 24) and refused to stay the execution of the judgment, save on terms that the appellant pay into court or provide security for the judgment debt, including the orders for costs [at para 50]

Conclusion

[37] The issues between the parties have already been considered and determined by the learned trial judge in favour of FML. There is no gainsaying that FML should not lightly be deprived of the fruits of its judgment, perhaps moreso when over 10 years have elapsed since the dispute arose between the parties. However, in my view, there is some prospect of success of the appeal which CCCL is pursuing and regard must be had to that. Yet that in itself is not sufficient to allow the stay of execution and the other relevant criteria must be considered. In my view, no financial hardship would be suffered by CCCL if it were to pay the judgment debt now, and indeed, the risk of injustice seems to be slightly greater to FML than it is to CCCL if the execution of the judgment were stayed. Nonetheless it is necessary to protect CCCL's ability to recover the judgment sum paid to FML in the event that the sum is paid, its appeal is successful, and the monies must be returned.

[38] It is my view that the interests of justice lie in a refusal of the application for the stay of execution of the judgment. At the same time the judgment sum must be secured to enable ready access to it by CCCL if it is ultimately successful, and the

monies have to be repaid to it. In these circumstances, therefore, I refuse the application for the stay of execution of the judgment and order the amount to be paid into a bank account which would be readily accessible to the parties as required, on the determination of the appeal.

Order

[39] Application for stay of execution of judgment is refused. The judgment sum is to be paid into an interest-bearing account in a reputable financial institution, as agreed between the parties, in the joint names of attorneys-at-law for both parties, until the appeal is determined by the court. Costs of this application to the respondent to be agreed or taxed.