

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 12/2013

APPLICATION NO 91/2014

**BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE MANGATAL JA (Ag)**

**BETWEEN CARIBBEAN CEMENT COMPANY LIMITED APPLICANT
AND FREIGHT MANAGEMENT LIMITED RESPONDENT**

Emile Leiba and Miss Jennifer Scott-Taggart instructed by DunnCox for the applicant

Mrs Trudy-Ann Dixon Frith and Miss Kimberley McDowell instructed by Grant Stewart, Phillips & Co for the respondent

30 July 2014 and 16 January 2015

PANTON P

[1] This application is for a variation of the order of Beswick JA (Ag) made on 2 October 2013 whereby she refused to stay execution of the judgment of Sinclair-Haynes J which was handed down on 24 January 2013. Sinclair-Haynes J had awarded judgment in the sum of US\$330,000.00 with interest in favour of the respondent and against the applicant, who has filed an appeal. The suit is one for breach of contract and or promissory estoppel.

The impugned order

[2] The order of Beswick JA (Ag) reads thus:

“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 be agreed or taxed.”

The nature of the application

[3] In its notice of application for court orders, the applicant is requesting that –

“1. The Order of the Honourable Mrs Justice Beswick J.A. (Ag) handed down on October 2, 2013 be varied as follows:

a. The Taxation of Costs in the Court below be stayed pending the outcome of the Appeal herein.

Alternatively:

b. Any Costs assessed on Taxation be paid into the joint, interest bearing account opened by the parties for deposit of the Judgment sum pending the determination of the Appeal filed herein.

2. The costs of this Application be costs in the Appeal.

3. Such further or other relief as this Honourable Court may deem fit.”

The grounds

[4] The grounds on which the application is based include the following:

- “1. By virtue of Rule 2.11 (2) of Section 2 of the Court of Appeal Rules: “Any order made by a single judge may be varied or discharged by the Court.
2. ...
3. ...
4. ...
5. The Applicant’s Appeal challenges both liability and quantum with the effect that success herein may result in costs in the Court below being wholly or partially awarded to the Applicant by this Court.
6. The discrepancy between the Respondent’s Bill of Costs in the amount of thirteen million one hundred and twenty-one thousand two hundred and seventy-one dollars sixty-one cents (\$13,121,271.61), and the Appellant/Applicant’s proposed costs set out in its points of dispute totalling two million seven-hundred and eighty-six thousand three hundred and twenty-five dollars forty-five cents (\$2,786,325.45), would lend itself to lengthy and contentious Taxation proceedings which will have served no purpose if the Appellant is successful in the Appeal herein.
7. In the circumstances, the application of the overriding objective as it relates to the use of the Court’s processes and the proportionate allocation of resources support this Taxation being stayed until the outcome of the Appeal.”

[5] The applicant has put forward an alternative if we are not minded to stay the taxation. It has suggested that the terms and rationale of the order of Beswick JA (Ag) support its extension to include any costs as taxed being paid into the joint interest-bearing account already opened in the names of the attorneys-at-law for the parties,

pending the outcome of the appeal. "There is no basis on which costs should be treated any differently from the principal Judgment", states ground number nine.

The submissions

[6] Mr Emile Leiba, for the applicant, made submissions that were along the lines set out in the grounds, and foreshadowed in the supporting affidavit of Miss Sabrina Cross, an associate in the firm of DunnCox. The affidavit gives a brief history of the matter in the courts, expresses confidence in the outcome of the appeal, and predicts the contentiousness and length of the taxation proceedings due to the huge difference in the parties' estimates of the costs.

[7] Mrs Trudy-Ann Dixon-Frith for the respondent submitted that the application to vary the learned judge's order bears no relationship to the application that was before her. It would be necessary for the applicant to demonstrate that Beswick JA (Ag) had considered the question of staying the taxation, and she had not. In the circumstances, said Mrs Dixon-Frith, it would be wrong to interfere with the learned judge's exercise of her discretion. Mrs Dixon-Frith cited the case **Hadmor Productions v Hamilton** [1983] AC 191 to support her point as to the caution to be exercised when an appellate court is considering the exercise of a discretion by a judge.

[8] Mrs Dixon-Frith traced the respondent's long wait for justice, given the fact that the "factual dispute between the parties arose over twelve (12) years ago in 2002". She described the instant application as an abuse of the process of the court as there is no legal basis for granting it. She submitted that the Civil Procedure Rules commence

with the primary premise that taxation of costs is not stayed pending an appeal. In this regard, she referred to rule 65.16. The fact that the taxation proceedings are likely to be contentious is not a proper basis for staying the taxation, she said.

[9] In reply, Mr Leiba submitted that the issue of costs was indeed before the single judge as costs form part of a judgment. That does not mean, he said, that he was contending that a stay of execution of a judgment automatically extends to costs. However, he thought that in the particular circumstances of this case, it would be appropriate to extend the stay of execution to cover the costs.

The decision

[10] There can be no doubt that Mrs Dixon-Frith is correct in her contention that the order of Beswick JA (Ag) had absolutely nothing to do with the taxation of the costs of the proceedings that led to the filing of the appeal. Before the learned judge was an application for stay of execution of the judgment pending the determination of the appeal. Her written reasons for judgment do not indicate that any thought was given by anyone in the case to the question of costs. That being the uncontradicted position, there is nothing to vary. There has been no error by the learned single judge, so her judgment remains as delivered.

[11] The other points raised in the case do not require any discussion as they would only be of material importance if there was a basis for the application to vary. However, I think it necessary to make a comment or two on the submission that there should be a stay of the taxation of costs because the proceedings will be long and contentious.

The courts are no stranger to contention or controversy. It is not a matter of moment that the act would be played out in the presence of the registrar or other taxing master, instead of before a judge. Further, it is the duty of parties and their attorneys-at-law, in keeping with the spirit of the Civil Procedure Rules and the Court of Appeal Rules, to bear in mind the needs of other litigants and so not lengthen proceedings and take up a disproportionate amount of the court's time. There is hardly a need for me to remind attorneys-at-law that the longer the proceedings, the greater the expenses for their clients, whatever the outcome of the case.

[12] It is only left for me to say that in the circumstances of the case, I am for the refusal of the application to vary the order of Beswick JA (Ag).

DUKHARAN JA

[13] I have read in draft the judgment of the learned President and agree with his reasoning and conclusions. I have nothing to add.

MANGATAL JA (Ag)

[14] I too have read the draft judgment of the learned President . I agree with his reasoning and conclusion and have nothing to add.

PANTON P

ORDER

The application to vary the order of Beswick JA (Ag) is refused. Costs to the respondent to be taxed if not agreed.