

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 16/2013

APPLICATION NO 26/2013

BETWEEN	CHANNUS BLOCK AND MARL QUARRY LIMITED	APPLICANT
AND	CURLON ORLANDO LAWRENCE	RESPONDENT

Howard Hamilton QC and Miss Jodian Hammit instructed by Frankson & Richmond for the applicant

Dale Staple instructed by Kinghorn and Kinghorn for the respondent

7, 10 May 2013

IN CHAMBERS

MORRISON JA

[1] On 23 September 2006, the respondent, who was an employee of the applicant, suffered catastrophic injuries in what Sykes J described as a "horrific accident" at the workplace. As a result, both legs had to be amputated above the knees and his whole person disability was assessed at the time of trial at 64%.

[2] On 11 January 2013, after a trial contested as regards both liability and damages, Sykes J gave judgment for the respondent against the applicant, the details of which are as follows:

General damages:

- a. Pain, suffering and loss of amenities JA\$19,000,000.00 at 3% interest

From the date of service of the claim for to January 11, 2013;

- b. Handicap on the labour market – JA\$2, 548,000.00 with no interest
- c. Loss of future earnings – JA\$2,548,000.00 with no interest
- d. Cost of future domestic care – JA\$8,008,000.00 with no interest;
- e. Cost of prosthetic device – JA\$2,152,000.00 with no interest

Special damages

- f. Pre-trial loss of earnings – JA\$1,145,000.00;
- g. Medical expenses – JA\$632,012.18;
- h. Cost of transportation – JA\$5,000.00

TOTAL - \$36,038.012.00 plus interest on the general damages at 3%

[3] Sykes J found that the applicant was liable on two bases: firstly, by virtue of its vicarious liability for the negligence of Mr Owen Bailey, a co-worker of the respondent; and secondly, on the basis that the applicant was in breach of its duty to provide a safe system of work for its employees.

[4] By notice of appeal filed on 21 February 2013, the applicant challenges the learned judge's findings on seven grounds, four of which are directed at the judge's assessment of the evidence and three at the question of damages.

[5] This is an application for a stay of execution pending the hearing of the appeal.

The grounds of the application, as set out in the notice of application, are as follows:

1. The Applicant applies to a single Judge in Chambers pursuant to Rules 2.10 and 2.11 and will rely upon Rule 2.14 and 2.15 of the Court of Appeal Rules, 2002, for an Order to stay the execution of the judgment in the Supreme Court action pending the determination of this Appeal.
2. The stay is necessary to preserve the status quo and the Applicant's interest therein pending the determination of the Appeal.
3. That if the stay is not granted, the Appeal will be rendered nugatory as there would be no use in proceeding to challenge a Judgment which the Applicant is mandated to pay whilst challenging it and if the Applicant was required to pay the Judgment awarded to the Respondent prior to the hearing of the Appeal, the Applicant would be in jeopardy of financial ruin and their ability to pursue the said Appeal would be severely prejudiced.
4. Further, if required to pay the Judgment sum, and the Applicant subsequently succeeded on Appeal, the Appeal would be rendered nugatory as it is unlikely that the respondent would be in a position to repay the Judgment sum to the Applicant.
5. That whilst the Applicant will suffer irreparable harm, prejudice and loss if the stay of execution is refused, the Respondent will suffer none should the execution of this Judgment be stayed pending the Appeal of this matter.
6. That the interest and administration of justice will not be compromised by the stay of the Judgment pending the determination of the Appeal.

7. The Applicant believes that they have a real prospect of success on Appeal and it is in the interests of justice that the Applicant be allowed to have the Judgment of the Supreme Court stayed until this Honourable Court determines the Appeal.
8. The Court has jurisdiction to extend the time pursuant to Rule 1.7(2)(b) of the Court o Appeal Rules, 2002."

[6] The application is supported by an affidavit sworn to on 15 March 2013 by Mr Anthony Charley, a director of the applicant company. In that affidavit, Mr Charley contends that the trial judge erred in his findings against the applicant and that, on the basis of the grounds of appeal filed, the applicant has a good and arguable appeal with a real prospect of success. Pleading the poor financial condition of the applicant, particularly in the light of a severe downturn in business over the last two years, Mr Charley avers that, in the absence of a stay of execution, the applicant will be exposed to financial ruin. Mr Charley states that the applicant's current expenditure outweighs its income and exhibits the company's financial statements in support. Finally, he states:

- "24. Further, should the Applicant be required to pay the judgment sum as Ordered then it would cause the Applicant's Appeal to become nugatory as there would really be no use in proceeding against a Judgment which it would be required to pay whilst challenging it.
25. That the situation is further compounded by the fact that if the Applicant was required to pay the Judgment sum awarded to the Respondent prior to the hearing of the Appeal, the Applicant would be in jeopardy of financial ruin and our ability to proceed with the Appeal would be severely prejudiced.

26. That whilst the Applicant will suffer irreparable harm, prejudice and loss if the stay of execution is refused, the Respondent will suffer none should the execution of this Judgment be stayed pending the Appeal of this matter.
27. That the Applicant is not in a financial position to comply with the Order as it will be utterly ruined as aforesaid if it is called upon at this time to do so and as a consequence of this, I respectfully make this Application on its behalf that the Judgment of Mr Justice B. Sykes be stayed pending the outcome of the Appeal filed herein."

[7] It is an unsatisfactory feature of this application that I have not had the benefit of any affidavit evidence from the respondent, a gap for which the respondent's legal advisors have acknowledged their full responsibility.

[8] In her admirable submissions in support of the application, Miss Jodian Hammit, who appeared with Mr Howard Hamilton QC for the applicant, directed me to rule 2.14 of the Court of Appeal Rules 2002 (CAR), which makes it clear that, except so far as the court below or a single judge of this court or the court itself may direct, "an appeal does not operate as a stay of execution or of proceedings under the decision of the court below." As regards the criteria for granting a stay, Miss Hammitt referred me to **Linotype-Hell Finance Ltd v Baker** [1992] 4 All ER 887 and **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065. In the former case, Staughton LJ said (at page 888) 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". In the latter case, Clarke LJ (as he then was) said this (at para 22):

“By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?”

In all the circumstances, Miss Hammit urged, the appeal in the instant case was not wholly unmeritorious and on the evidence supplied by Mr Charley it is clear that the applicant would be ruined without a stay.

[9] Mr Staple for the respondent, on the other hand, pointed out that the grounds of appeal in the main sought to challenge the trial judge’s findings of fact and that, on long established principle, the Court of Appeal will ordinarily be hesitant to interfere with those findings. Mr Staple referred me to paragraph 13 of **Hammond Suddard**, in which Clarke LJ said that “the evidence in support of an application for a stay needs to be full, frank and clear”, and criticized the financial information put forward by Mr Charley, on the ground that it did not satisfy this requirement. He urged me not to grant a stay or alternatively, if I were reminded to grant a stay, to do so only on the basis that the applicant pay some money into court.

[10] The jurisdiction of a single judge of appeal to grant a stay of execution is, as Phillips JA observed in **Reliant Enterprise Communications Ltd v Twomey Group and Another** (SCCA 99/2009, App 144 and 181/2009, judgment delivered 2 December 2003, para [43]) “absolute and unfettered”. The starting point is, in my view, the well established principle that there must be a good reason for depriving a claimant from obtaining the points of a judgment. In deciding whether or not to grant a stay, this court has in recent times consistently applied the test formulated in **Hammond Suddard** and it is now well established that the applicant must show that he has an appeal with some prospect of success, and that he is likely to be exposed to ruin if called upon to pay the judgment. It is, in my view, essentially a balancing exercise, in which the courts seek to recognise the right of a successful claimant to collect his judgment, while at the same time giving effect to the important consideration that an appellant with some prospect of success on appeal should not have his appeal rendered nugatory by the refusal of a stay.

[11] Applying those principles to the instant case, I consider, firstly, the prospects of success. This is an appeal, as Mr Staple pointed out, from the trial judge’s findings of fact. Sykes J made critical findings based on the evidence of the respondent and Messrs. Owen and Donovan Bailey and it seems to me that this court will be hard put to disturb those findings on appeal, even on the basis that, had it heard the evidence itself, it might have come to a different view.

[12] However, despite what I think will clearly be an uphill task, I am not prepared to say at this very preliminary stage, without having seen the notes of the evidence given

at trial, that the applicant's appeal is "wholly unmeritorious or wholly unlikely to succeed" (per McGaw LJ in **Sewing Machine Rentals Ltd v Wilson & Another** [1976] 1 WLR 37). Further, I have in mind as well that there is an appeal against the quantum of damages, the viability of which I am not able to assess on the material before me at this time.

[13] I therefore turn to a consideration of whether this is a matter in which it would be right to grant a stay in the proper exercise of my discretion. As regards the applicant's financial position, it is clearly discernible from the income statement provided by Mr Charley that there has been a downturn in the applicant's income and profits in 2012 as against 2011. However, it does seem, even to my untrained eye, to be difficult to form a clear view of the applicant's prospects, without taking a longer view, perhaps say over a five year period, of its performance. By that means, the court would be better able to assess the company's prospects of surviving the current downturn in business in the medium to longer term.

[14] On this evidence therefore, I am not prepared to conclude that the applicant is likely to be ruined if called upon to meet the judgment in this case. However, I cannot and do not discount Mr Charley's unchallenged evidence of the financial constraints currently facing the company and I accept that meeting a judgment of nearly \$40,000,000.00 in full at this time would put severe strain on the resources of the company, whose average gross revenue over the last two years has been just over \$70,000,000.00.

[15] Taking all things into account, therefore, I consider that this is a case in which it will be appropriate to grant a partial stay of execution only, in an effort to balance the respondent's undoubted right to the fruits of his judgment against the applicant's right to pursue its appeal. I therefore order a stay of execution pending the hearing of the appeal, on condition that the applicant pay the sum \$5,000,000.00 on or before 31 July 2013, in the manner following:-

- (i) \$2,142,102.00 to be paid to the respondent's attorneys-at-law for the benefit of the respondent.
- (ii) \$2,857,988.00 to be paid into a joint interest bearing account in the names of the attorneys-at-law for the applicant and the respondent.

[16] I will make no order as to the costs of this application.