JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 42/97

MOTION NO:20/97

COR: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE WALKER, J.A. (AG.)

BETWEEN	**FLOWERS, FOLIAGE & PLANTS OF JAMAICA LIMITED**	**1ST DEFENDANT/ APPELLANT**
AND	**JENNIFER WRIGHT**	**2ND DEFENDANT/ APPELLANT**
AND	**DOUGLAS WRIGHT**	**3RD DEFENDANT/ APPELLANT**
AND	**JAMAICA CITIZENS BANK LIMITED**	**PLAINTIFF/ RESPONDENT**

Dennis Goffe, Q.C. & Mrs. Sandra Minott-Phillips for Respondent instructed by **Myers, Fletcher & Gordon.**

R.N.A. Henriques, Q.C. and Miss Katherine Francis for Appellants instructed by **Clinton Hart & Co.**

June 9, 13, July 21 & September 29, 1997

RATTRAY, P.

This matter comes before the Court on a Motion by Counsel for the Jamaica Citizens Bank Limited, the plaintiff/respondent, in whose favour Reid J, had on the 21st of April, 1997 ordered summary judgment in the sum of J$8,689,229.25 with interest amounting to J$2,413,595.52 in a suit brought by the bank against the defendants/appellants in respect of money loaned by the bank to the first named defendant/appellant. This sum was secured by mortgage of property situated at Mount

Dakin in the parish of St. Andrew as well as personal guarantees by the second and third named defendants/appellants and a second mortgage on premises 29-31 Norbrook Drive in the parish of Saint Andrew the property of the second defendant/appellant. Reid J, also dismissed an application by the appellants for leave to file their Defence out of time and for an injunction restraining the plaintiff/respondent from exercising its power of sale under the mortgage over the lands of the second defendant/appellant at 29-31 Norbrook Drive. He, however, granted leave to appeal.

On the 5th May, 1997 an application by the appellants for a stay of execution of the judgment was dismissed by Chester Orr J. An appeal was filed on the 8th of May, 1997. On the 14th May, 1997 Downer, J.A. granted a stay of execution of the judgment without conditions. It is this Order which is being challenged before us by the plaintiff/respondent. Before Downer, J.A. a preliminary point was unsuccessfully taken against the hearing of the application on the ground that the appellants had failed to comply with Rule 22(4) of the Court of Appeal Rules.

On the Motion before this Court Mr. Dennis Goffe, Q.C. in support of the application to discharge the order of Downer, J.A. has maintained that the learned Judge of Appeal erred in dismissing the preliminary objection.

Rule 21(1) of the Court of Appeal Rules provides -

> "21. (1) Except so far as the Court below or the Court may otherwise direct -
>
> > (a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the Court below; ..."

Rule 22 (4) reads:

> "22. (4) Wherever under the provisions of the Law or of these Rules an application may be made either to the Court below or to the Court, it shall be made in the first instance to the Court below."

Mr. Goffe, Q.C. placed heavy reliance on the decision of Swaby J.A. in Chambers in **Beverley Shields v. Jennifer Graham** 12 JLR page 1497. In that case

McCarthy J, (Acting) in the Supreme Court had awarded damages in a negligence action against the appellant. An application for stay of execution for six weeks to enable the appellant to file an appeal was refused by the trial judge. Notice and grounds of appeal were filed. Subsequently, the appellant issued a summons to the respondent to appear before a Judge of the Court of Appeal in Chambers for a Stay of Execution pending the hearing of the appeal or further order. A preliminary objection taken by the respondent similar to the submission of Mr. Goffe, Q.C. before us, that the effect of Rules 21(1) and 22 (4) is that an application for a stay of execution or of proceedings under the decision of the Court below should be made in first instance to the Court below and if that court refuses such application a similar application may thereafter be made to the Court of Appeal, was upheld by Swaby, J.A.

The learned Judge of Appeal relying on **Cropper vs. Smith** (1883) 24 Ch. Div. 305 and following Graham Perkins, J.A. in **Hilel et al v. Wallen** (1973) June 5, C.A. (unreported) stated that:

> "Rule 22 (4) contemplates that at the time of the application for stay of execution is made there should be in existence a pending appeal and that an application therefore made to the trial judge on judgment being delivered was not one made under the Court of Appeal Rules but one which involved the inherent jurisdiction of the Supreme Court over all judgments and orders which it has made -
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> > 'Now that there is an appeal pending an application for stay of execution (or further stay of execution) may be made either to the Court below or to the Court of Appeal under Rule 24(1), and Rule 22(4) provides that where this is done, such application shall be made in the first instance to the Court below'."

To apply the reasoning of Swaby, J.A. to the chronology of the instant case, the application for Stay of Execution to Chester Orr J, dismissed on the 5th of May, 1997 was prior in time to the filing of the appeal on the 8th of May and, therefore, there was no pending appeal at that time. The question can be asked as to whether

an appeal has to be filed before an application can be made to stay execution pending the appeal? In **Tuck v. Southern Counties Deposit Bank** (1889) 42 Ch. Div. 471 Kay, J who was the Trial Judge refused an application made to him 9 days after judgment and commented that the application should be made if possible at the time the Court gives its judgment. The case is often cited in support of that proposition. It brings into doubt the restrictive meaning placed on the word "pending" in the **Shields v. Graham** case.

In the instant case the application for stay of execution to Chester Orr J dismissed by him on the 5th of May 1997 was prior in time to the filing of the appeal on the 8th of May and, therefore, in the reasoning of Swaby J.A., there would have been no pending appeal at that time.

Mr. R.N.A. Henriques, Q.C., however, has urged us to hold that the application before Downer, J.A. was made not by virtue of the provisions of Rule 21(1) but under the provisions of Rule 33(1) and (2) which read as follows:

> "33. (1) In any cause or matter pending before the court a single judge of the Court may, upon application, make orders for -
>
> (a) - (b) ...
>
> (c) a stay of execution on any judgment appealed from pending the determination of such appeal;
>
> (d) - (e) ...
>
> (2) Every order made by a single Judge of the Court in pursuance of this rule may be discharged or varied by the Court."

Mr. Henriques Q.C. maintains that the order of Downer, J.A. was made subject to further application to the Court under Rule 33(2).

In my view there are two options open to the intending applicant for a stay of execution pending the hearing of the appeal. After filing the appeal the applicant may apply under section 21(1) of the Rules in which event the application is made first to the court below and if refused to the Court of Appeal as provided for by section 22(4).

It is to be recognized that reference to the Court in the Rules is a reference to the Court of Appeal constituted of three Judges of Appeal, as distinct from reference to a Judge of the Court. The second option is for an application to be made after the filing of the appeal directly to a single Judge of Appeal as was done in the instant case under the provisions of Rule 33(1). The determination of this single Judge may on application of either party be discharged or varied by the Court. The rules therefore provide in both cases for a review process by the Court of Appeal.

Both Swaby J.A. in **Shields v. Graham** and Graham-Perkins, J.A. in **Hilel et al vs. Wallen** were sitting as a single Judge of Appeal not as the Court of Appeal. It does not appear in either case that the provisions of Rule 33(1) which invest the jurisdiction in the single Judge of the Court was brought to their attention. In both cases they treated themselves as the court and, therefore, falling within the provisions of Rule 21(1) and Rule 22(4).

It is to be noted that **Cropper vs. Smith** relied upon by both Swaby J.A. & Graham-Perkins J.A. was before the Court of Appeal on a Motion for a stay of proceedings under the judgment pending appeal which application had been refused by Chitty, J. The defendants then gave Notice of Motion before the Court of Appeal requesting that time for payment of the damages be extended until after the hearing of the appeal. The objection taken was to the effect that the application could not be made to the Court of Appeal on an original motion and that the time for appealing the Motion dismissed by Chitty, J had expired. The Court of Appeal found that there was a concurrent jurisdiction in both the Court below and the Court of Appeal and that Rule 17 (the equivalent to our rule 22(4)) does not take away the jurisdiction of the Court of Appeal but requires its exercise to be postponed until an application had first been made to the court below. The application therefore to the Court of Appeal after the refusal by Chitty J was not properly an appeal and need not have been brought within the time stipulated for the bringing of appeal.

The distinction between the instant case and **Cropper vs. Smith** was that the latter case was brought before the Court of Appeal and not before a Judge of Appeal under any provisions of the U.K. Rules. For these reasons we were not prepared to follow **Beverley Shields vs. Graham** and we rejected the preliminary point taken by Goffe, Q.C. It is noteworthy that the U.K. Order 59 rule 13 reads as follows:

> "13. (1) Except so far as the Court below and the Court of Appeal or a single judge may otherwise direct -
>
> > (a) an appeal shall not operate as stay of execution of proceedings under the decision of the Court below;"

Our rule does not include the words "or a single judge." This buttresses the submission of Mr. Henriques, Q.C. that the application before Downer, J.A. came under the provisions of Rule 33(1) and not Rule 21(1).

Alternatively, however, Mr. Goffe, Q.C. submitted that Downer, J.A. erred in not making an order that the stay of execution granted was subject to a condition that the amount of the judgment be paid by the appellant to Attorneys-at-Law for the respondent to be held by them in escrow and paid out by them in accordance with any order made by the Court of Appeal on the determination of the appeal. He relied heavily in support of this submission on the decision of this Court in **SSI (Cayman) et al v. International Marbella Club S.A.** SCCA 57/86 (unreported) delivered on February 6, 1987 referred hereinafter by me as "Marbella". In that case the plaintiff claimed to recover a large sum of money advanced to the defendants and secured by debenture and guarantee with respect to property at Dragon Bay, and the sale of the Dragon Bay Hotel property "after all necessary directions enquiries or otherwise." The defendant neither denied the loan nor the magnitude thereof but contended in a Defence and Counter Claim that they had been fraudulently induced by the plaintiff to enter into certain collateral and inter-dependent agreements including inter alia a

management agreement with respect to the hotel. The defendant claimed also cancellation and delivery of the agreements, the taking of accounts and "an injunction to restrain the plaintiff from exercising or attempting to exercise any powers of sale or foreclosure that it may have under the debenture ...". The trial having been part heard Harrison J, as he then was, made an order restraining the plaintiff from exercising the powers of sale or other disposition of the Dragon Bay property on certain conditions. Both parties appealed; the plaintiff against the conservatory order, the defendant against the conditions.

In the Court of Appeal in making a determination in favour of the plaintiff Rowe, P. accepted as a correct statement of the law the direction of Walsh P in the High Court of Australia in **Inglis and Another vs. Commonwealth Trading Bank of Australia** (1971-72) Volume 126 CLR at page 164-165 -

> "In my opinion, the authorities which I have been able to examine establish that for the purpose of the application of the general rule to which I have referred, nothing short of actual payment is regarded as sufficient to extinguish a mortgage debt. If the debt has not been actually paid, the Court will not, at any rate as a general rule, interfere to deprive the mortgagee of the benefit of his security, except upon terms that an equivalent safeguard is provided to him, by means that the plaintiff bringing an amount sufficient to meet what is claimed by the mortgagee to be due.
>
> The benefit of having a security for a debt would be greatly diminished if the fact that the debtor has raised claims for damages against the mortgagee were allowed to prevent any enforcement of the security until after the litigation of those claims had been completed. "

The reasoning of Walsh J, was supported by Chief Justice Barry in dismissing the appeal when he stated as follows:

> "The case falls fairly, in my opinion, with the general rule applicable when it is sought to restrain the exercise by a mortgagee of his rights under the mortgage instrument. Failing payment into the court

> the amount sworn by the mortgagee was due and owing under the mortgage, no restraint should be placed by order upon the exercise of the respondent mortgagee's rights under the mortgage."

With this proposition Carey, J.A. agreed, supporting Rowe, P when he stated:

> "There is no question but that the Court has an undoubted power to restrain a mortgagee from exercising his powers of sale, but if it so orders, the term invariably imposed is that the amount claimed must be brought into Court."

Downer, J.A. (Ag.) also agreed stating:

> ... that the conditions imposed did not follow the precedents of compelling the defendant to pay the amount claimed into court. Such a condition is essential to be just to the mortgagee."

It is to be noted that the Rule relied upon is stated "as a general rule".

Courts of equity do not shackle themselves with unbreakable fetters if the justice of the particular case demands a more flexible approach.

In reply Mr. Henriques, Q.C. has urged upon us that the Court of Appeal should only interfere with the discretion of Downer, J.A. which he exercised when he made the order without laying down conditions; if the Court of Appeal found that he misdirected himself in principle or had been plainly wrong. (See **Wren v. Braunston Canal Services & Others** Times Law Report November 23, 1990 page 740.)

Marbella is distinguishable from the instant case in that it concerns the borrowing of money secured by debentures. In the instant case the applicant was not a primary borrower but a guarantor and the mortgage was a collateral security for $200,000.00 in support of the guarantee. The applicant maintains that the guarantee was not valid and enforceable and the mortgage would therefore not be enforceable. There were triable issues of fact and of law concerning whether, as alleged by the applicant (1) the guaranty was void for uncertainty and/or past consideration; (2) the bank acted legally in upstamping the mortgage as well as in respect of the amount to

which it was upstamped. Consequently, Mr. Henriques Q.C. urges that the Marbella principle would not apply in this case.

He further maintained that the old rule upon which Marbella and such cases were determined is no longer followed and cites in support **Linotype-Hell Finance Ltd v. Baker** (1992) 4 All E R 887 the Headnote of which reads -

> "Where an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application that the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success. The old rule that a stay of execution would only be granted where the appellant satisfied the court that if the damages and costs were paid there would be no reasonable prospect of recovering them if the appeal succeeded is now far too stringent a test and does not reflect the court's current practice."

In the Court of Appeal Staughton, L.J. stated at page 888:

> "In the Supreme Court Practice 1991 vol 1, paragraph 59/13/1 there are a large number of nineteenth century cases cited as to when there should be a stay of execution pending an appeal. At a brief glance they do not seem to me to reflect the current practice in this Court; and I would have thought it was much to be desired that all the nineteenth century cases should be put on one side and that one should concentrate on the current practice. It seems to me 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. The passage quoted in the Supreme Court Practice from Atkins v. Great Western Rly Co (1886) 2 TLR 400, 'As a general rule the only ground for a stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable probability of getting them back if the appeal succeeds, seems to be far too stringent a test today.
> It is, in my opinion, an arguable appeal. It can be said that the judge should not have dismissed summarily the defendant's suggestion that he had not signed the authority to execute a guarantee. That may well have been a triable issue which should have gone to trial."

Mrs. Wright has deponded in her affidavit sworn to on the 9th May, 1997 that "if execution of the judgment entered herein is not stayed and my house sold I would be ruined financially." In addition, there are triable issues of fact which have remained without the benefit of judicial determination by virtue of the order made in favour of the plaintiff/respondent by Reid, J.

The principle stated by Staughton LJ is more in accord with an acceptable concept of equity and justice, a relevant ingredient for the exercise of judicial discretion once it is established that there are these triable issues which would be denied the judicial scrutiny absent in a summary judgment.

For those reasons we dismissed the Motion to discharge the order made by Downer, J.A. and granted the stay of execution in the terms stated.

GORDON, J.A.

I agree.

WALKER, J.A. (Ag.)

I also agree.