[2010] JMCA App 3

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 28/2010

APPLICATION NO. 47/2010

BETWEEN	CALVIN GREEN	APPLICANT
AND	WYNLEE TRADING LTD	RESPONDENT
AND	NAYLOR & TURNQUEST	GARNISHEE

Mrs M. Georgia Gibson-Henlin instructed by Henlin Gibson Henlin for the applicant

Miss Carol Davis for the respondent

Mrs Lilieth Turnquest (representing the garnishee) in attendance

23 and 29 March 2010

IN CHAMBERS

MORRISON JA:

Introduction

[1] This is an application by the applicant to stay execution of the order of Donald McIntosh J made on 8 March 2010, whereby he ordered that Provisional Attachment of Debt Orders made on 16 February 2010 be made final, with costs to the respondent and the garnishee to be taxed or agreed. Pursuant to leave to appeal granted by the judge, the applicant

has appealed against that order and, by notice of application for court orders filed on 9 March 2010, the applicant seeks an order staying execution of the judge's order.

The background

[2] The background to this application can be shortly stated. On 30 April 2008, Pusey J ordered specific performance of an agreement for the sale of land registered at Volume 1188 Folio 971 of the Register Book of Titles, between the applicant as vendor and the respondent as purchaser, with costs to the respondent to be agreed or taxed. The applicant's appeal to this court against Pusey J's judgment was dismissed on 11 May 2009, again with costs to the respondent to be agreed or taxed.

[3] On 22 December 2009, the respondent's costs of the appeal were taxed in the sum of $1,125,145.35 and, by Final Costs Certificate dated 29 December 2009, the applicant was ordered to pay this sum to the respondent. On 11 February 2010, the respondent's costs in the Supreme Court action were taxed in the sum of $1,566,175.00 and, by Final Costs Certificate dated 12 February 2010, the applicant was ordered to pay that sum to the respondent.

[4] The garnishee, a firm of attorneys-at-law, acted for the respondent in the sale which, up to the date of the issue of the last final costs certificate, had still not been completed. By letter dated 23 October 2009, the

garnishee had written to Henlin, Gibson, Henlin, who were the attorneys-at-law acting for the applicant in the sale, confirming that the respondent was now in a position to complete the sale. Accordingly, the garnishee issued its "irrevocable undertaking" to the applicant's attorneys to the sum of $6,386,640.00, being the balance due to complete the sale after deduction of the expected mortgage proceeds, in exchange for the usual completion documents, viz., the Duplicate Certificate of Title endorsed with the name of the respondent as transferee, letters of possession and proof that property taxes were paid up to date.

[5] On 2 February 2010, the applicant's attorneys sent the respondent's attorney a cheque for $219,671.91 as "part payment on the costs of the Appeal", but this letter said nothing about how the substantial balance owing in respect of both sets of costs would be paid. On 16 February 2010, the respondent obtained a Provisional Attachment of Debts Order in respect of the total amount of the balance of the taxed costs ($2,707,173.50), directed to the garnishee, attaching all moneys in its hands to which the applicant was beneficially entitled. This order was duly served on the garnishee who, by letter dated 19 February 2010, then advised the applicant's attorneys that, as a result of the order of the court, it was not in a position to fulfil its undertaking to pay the balance purchase price of $6,386,640.00 and accordingly enclosed a cheque for $3,914,991.56, being the difference between the amount of the

undertaking and the amount attached by the order. By letter bearing the same date, the applicant's attorneys immediately returned this cheque to the garnishee on the ground that "it does not satisfy your irrevocable undertaking contained in your letter of October 23, 2009".

[6] On 8 March 2010, the provisional order was made final by the order of Donald McIntosh J and, on 9 March 2010, the garnishee remitted a cheque for $2,707,173.50 to the respondent's attorneys, pursuant to that order.

[7] In his procedural appeal filed on 9 March 2010, the applicant challenges Donald McIntosh J's order on two grounds:

> "(a) The learned judge erred as a matter of fact and/or law and/or wrongly exercised his discretion granting the final orders because there is no debtor/creditor relationship between the garnishee and the Appellant.
>
> (b) The learned judge erred as a matter of fact and law in granting the final order in relation to the Provisional Attachment of Debts Order of the 12th February 2010 because the said order was irregularly obtained. It was obtained at a time before the debt had become enforceable in accordance with r. 65.12 and 43.2 of the Civil Procedure Rules 2002."

The application for a stay

[8] In written submissions filed on the applicant's behalf in support of the application for a stay, I was referred by Mrs Gibson-Henlin to dicta from

two recent decisions of single judges of this court on the criteria for the grant of a stay pending appeal ("...a stay should not be granted unless the appellant can show that the appeal has some prospect of success...", per Harrison JA in ***Watersports Enterprises Ltd v Jamaica Grande Ltd* and Others**, SCCA No. 110/2008, judgment delivered 4 February 2009, para. 7, and "...the decision whether or not to grant a stay is a discretionary one depending upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or the other or both parties if [the court] grants or refuses a stay", per Morrison JA in ***Cable & Wireless (Jamaica) Ltd v Digicel (Jamaica) Ltd***, SCCA No.148/2009, judgment delivered 16 December 2009, para. 20). Mrs Gibson-Henlin referred me as well to two English decisions which are often cited in this connection in this court (***Linotype-Hell Finance Ltd v Baker*** [1992] 4 All ER 887, 888, in which Staughton LJ said 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", and ***Hammond Suddard Solicitors v Agrichem International Holding Ltd*** [2001] All ER (D) 258) (Dec).

[9] Mrs Gibson-Henlin submitted that the applicant had a "strong prospect" of success on appeal in this case, for at least two reasons. Firstly, that the procedure for attachment of debts had been misused in this case in that it was only applicable where there was a debtor/creditor

relationship between the judgment debtor and the garnishee (***Lancaster Motor Co (London) Ltd v Barclays Bank Ltd*** [1941] 1 KB 675 and ***Industrial Diseases Compensation Ltd v Marrons*** [2001] BPIR 600). Secondly, that the provisional attachment of debts order in this case had been improperly obtained, in that (as regards the Supreme Court costs, which were taxed on 11 February and the Registrar's certificate issued on 12 February 2010) it had been applied for before the expiration of the period prescribed by the rules (rules 43.2 and 65.12 of the Civil Procedure Rules 2002 – "the CPR").

[10] Finally, Mrs Gibson-Henlin submitted that the applicant came within the criteria laid down by the authorities for a stay, in that without it he would be ruined and there was an obvious risk of injustice in the circumstances of the case if a stay was not granted: without a stay, his appeal would be rendered nugatory.

[11] Miss Davis disagreed, submitting firstly that, to the extent that the garnishee held the funds to pay the balance of the purchase price on behalf of the respondent to the applicant's attorneys, and had given the firm's professional undertaking to pay over those funds, there was very much a debtor/creditor relationship between the garnishee and the applicant, thus satisfying the requirements of the rules. Secondly, she submitted that the provisional order had been obtained regularly, in that

the applicant had in fact been a judgment creditor from the date of the judgment and was entitled to be paid from the date the Registrar's certificates of the results of the taxations in this court and in the Supreme Court had been obtained. But in any event, Miss Davis pointed out, there was nothing remaining to stay, as the final order had now already been complied with by the payment of the costs by the garnishee to the respondent's attorney on 9 March 2010.

The jurisdiction to order a stay

[12] Without either an order from the court below or of this court, an appeal does not operate as a stay of execution (Court of Appeal Rules (CAR), rule 2.14). However, rule 2.11(1)(b) permits a single judge of this court to order "a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal". The threshold question on any such application is, of course, whether the material provided by the parties discloses at this stage an appeal with "some prospect of success" (per Harrison JA in ***Watersports Enterprises***, supra para. 8). Once that criterion has been met, the next step is for the court to consider whether, as a matter of discretion, the case is a fit one for the granting of a stay. In this regard, the overriding consideration is well expressed in the judgment of Clarke LJ (as he then was) in ***Hammond Suddard*** (at para. 22):

> "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 the 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?"

The applicant's prospects of success in the appeal

[13] The applicant's first ground of appeal relates to the applicability in the circumstances of this case of Part 50 of the CPR, which, as rule 50.1(1) indicates, "provides a procedure under which a judgment creditor can obtain payment of all or part of a judgment debt from a person within the jurisdiction who owes the judgment debtor money". This ground poses squarely the question whether the garnishee in this case can be said to be a person who owes money to the applicant.

[14] Both of the cases cited by Mrs Gibson-Henlin support the general proposition that, for the rule to apply, the relationship between the garnishee and the judgment debtor "must be one of debtor and creditor" (per Sir Wilfred Greene MR in ***Lancaster Motor Co***, at page 679; see also para. 3.2.1 of ***Industrial Diseases Compensation Ltd*)**. So, Mrs Gibson-Henlin argues, the garnishee in this case really held the balance of the purchase price due to the applicant as

trustee for the respondent, which was the party which owed those funds to the applicant as vendor.

[15] I can readily see the force of Miss Davis' submission that, from a practical point of view, the funds held by the garnishee in this case, an undertaking having been given by the garnishee to pay them over to the applicant's attorneys, did in effect constitute a debt due from the garnishee to the applicant for the purposes of Part 50 (and in David Barnard's 'The Civil Court in Action', 2nd edn at page 244, garnishee orders are described as "a very effective means of execution where the creditor knows that a solicitor is holding monies in a client account for the debtor, eg upon the sale of a house"). Despite this, however, I cannot say that Mrs Gibson-Henlin's submission based on the authorities is completely unarguable. Indeed, ***AIG Capital Partners Inc v Republic of Kazakhstan*** [2006] 1 All ER 284 is a recent example of a case in which it was held by Aikens J at first instance that money held by a bank to the account of a trustee was not a debt accruing to the beneficiary of the trust within the meaning of the similar rule 72.2 of the English CPR (see also ***Continental Transfert Technique Ltd v The Federal Government of Nigeria*** [2009] All ER (D) 239 (Nov), another decision at first instance, in which it was held that CPR 72.2 was not intended to deal with debts other than those actually owed in the name of the judgment debtor).

[16] I therefore think that this ground, even if it does not strike me as having, as Mrs Gibson-Henlin submitted, a "strong prospect", may nevertheless have some prospect of success.

[17] The applicant's second ground of appeal is based on the provisions of rules 43.2 and 65.12 of the CPR. Rule 43.2(1) provides that the general rule is that "once a judgment or order has become enforceable, the court must issue an enforcement order if the judgment creditor files the appropriate form of request", while rule 65.12 provides that "a party must comply with an order for the payment of costs within 14 days of... (b), if the amount of those costs...is determined [by taxation] the date of the certificate which states the amount...". Thus it was submitted that the Registrar's certificate in respect of the Supreme Court costs having been issued on 12 February 2010, the application for the provisional attachment of debts order filed on that same day was premature, insofar as it related to those costs, as the judgment did not become enforceable until the Registrar's certificate was issued and the application was made less than 14 days after that date.

[18] There does not appear to be anything in either of these rules prescribing the time within which an application for an enforcement order is to be made. It therefore seems to me to be difficult to read rule 65.12 as doing anything more than allowing the judgment debtor a 14 day grace period within which to pay the costs as certified by the registrar's certificate, with the result that, by the time

the final order was made on 9 March 2010, the time allowed for compliance had, as Miss Davis submitted, "long passed". However, as this question was not fully argued before me and as I have already determined that the applicant's first ground of appeal has reached the threshold, I will say nothing more on this point.

Disposal of this application

[19] The question which remains, therefore, is how should the court's discretion to order a stay be exercised in the circumstances of this case or, in the words, what order will best serve the interests of justice? To take the question of financial ruin first, despite the hardship referred to by the applicant in his affidavit in support of this application, I have seen no evidence to support the contention that without a stay he will be driven to financial ruin. Indeed, the tenor of the applicant's evidence is in fact to the contrary, to the extent that he insists that, given time to pay, he has every intention of paying (and presumably will be in a position to pay) the respondent's costs. I therefore cannot say that, without a stay, the applicant will suffer irremediable harm. On the other hand, it does appear to me that the respondent is likely to suffer such harm if a stay is ordered, since, despite the applicant's protestations, it is not at all clear that he has any real intention of complying with the orders for costs against him, which he now accepts to be binding on him.

[20] Taking all factors into account therefore (including the applicant's submission that without a stay his appeal will be rendered nugatory), bearing in

mind the normal rule that an appeal does not operate as a stay of execution and also the fact that the applicant's liability to the respondent for the total amount of the costs cannot now be disputed, I am not persuaded that this is a case in which the interests of justice will be best served by granting a stay.

[21] But even if I had come to a different conclusion on this, the question that would then inevitably arise is whether, the garnishee having paid out the amount due to the respondent's attorney in accordance with the order made by Donald McIntosh J, there remains anything for the court to stay. The applicant says, presumably in anticipation of this very point, that there "is no evidence that the moneys were paid to the Respondent". However, it appears to me that, even if the capacity in which the funds were being held by the garnishee originally may be open to argument, there can be no doubt that the garnishee's subsequent payment pursuant to the final order of the court was made to, and received by, the respondent's attorney as agent for the respondent, in the sense that those funds can only now be held by the attorney (subject to whatever arrangements as to fees there might be) to the respondent's order. In these circumstances an order staying execution of the final order would clearly be an exercise in futility, execution having already been completed.

Conclusion

[22] For all of the reasons given above, the application for a stay of execution of the order of Donald McIntosh J made on 9 March 2010 is accordingly refused.

I have not heard counsel on the matter of the costs of this application, so I therefore invite written submissions from both sides on this issue, to be submitted to the Registrar of this court within 14 days of today's date. I will make a further order as to the costs within seven days of receipt of the last submission.

[23] Finally, I should indicate that I was told by Mrs Lilieth Turnquest, who was in attendance at the hearing of this application representing the garnishee, that, as a result of the matters canvassed before me, proceedings have been commenced against her firm on behalf of the applicant for a breach of the undertaking given to his attorneys in the letter of 23 October 2009. Nothing pertaining to that aspect of the matter is of course before me, but it is right, I think, to record my complete sympathy for the unenviable dilemma in which the garnishee was placed by the orders for attachment of debts which were served upon it.