[2019] JMCA Civ 48

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 42/2018

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA

BETWEEN	**MARILYN HAMILTON**	**APPELLANT**
AND	**ADVANTAGE GENERAL INSURANCE COMPANY LIMITED (Formerly United General Insurance Company Limited)**	**RESPONDENT**

Written submissions filed by Ballantyne, Beswick & Company for the appellant

Written submissions filed by Hart Muirhead Fatta for the respondent

20 December 2019

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

PHILLIPS JA

[1] In this matter, the appellant, Marilyn Hamilton (MH), filed a notice of appeal on 15 May 2018, challenging the decision of Batts J, contained in an oral decision made on 14 May 2018. The learned judge, *inter alia*, granted a stay of execution of an order for seizure and sale in respect of a default costs certificate that had been issued against the

respondent, Advantage General Insurance Company Limited (AGI). He granted that stay on condition that $1,600,000.00, already paid into court, should remain until further orders of the court. MH sought to challenge that decision on several bases, including that, the learned judge had failed to appreciate that the prejudice to MH would have been greater than that to AGI; and he had also failed to appreciate that the application to set aside the default costs certificate was unlikely to succeed as the default costs certificate and the order for seizure and sale issued as a result, were validly obtained.

Background facts

[2] The default costs certificate which undergirds the order for seizure and sale was obtained on 12 March 2018. No points of dispute having been filed by AGI, costs were ordered in the sum of $11,484,070.00 to Ballantyne, Beswick & Company (BB&Co) on behalf of MH.

[3] On the following day, the order for seizure and sale of goods dated 13 March 2018, but bearing two court stamps from the commercial division of the Supreme Court of 9 and 12 March 2018, was issued. It bore the signature of the acting registrar of the Supreme Court. The order stated that MH, having obtained a default costs certificate on 12 March 2018 against AGI on two applications before the Court of Appeal (application nos 143 and 144/17), and the fact that it had appeared to the court that the amount had remained wholly unsatisfied, the order was directed to the bailiff to sell such goods and chattels of AGI, from the address at 4-6 Trafalgar Road, Kingston 5, Saint Andrew,

being subject to execution, and that the bailiff should apply the proceeds of sale in satisfaction of the said default costs certificate.

[4] The affidavit in the support of the issuance of the order of seizure and sale was made by Jason Mitchell, sworn to on 12 March 2018, although it bore the date stamp of the commercial division of the Supreme Court of 9 March 2018. He deponed that he was an associate at the law firm of BB&Co representing MH in the litigation proceedings. He stated that MH had complied with all the requirements pursuant to rule 46.3 of the Civil Procedure Rules 2002 (CPR). He stated that the judgment was a money judgment, which was currently due as it had not been satisfied, and MH was therefore entitled to enforce the judgment against AGI, which was an insurance company, and in a position to satisfy the order.

[5] Subsequently on 15 March 2018, AGI filed an appeal from the acting registrar's decision to order the seizure and sale of AGI's goods, to a judge of the Supreme Court, in chambers. There were two grounds of appeal as follows:

> "a. The learned Acting Registrar erred in finding that an order for seizure and sale may be made on a default costs certificate which is not pursuant to basic costs or concomitant with the execution of a money judgment from the Court;
>
> b. The learned Registrar erred in finding that a default costs certificate may be enforced by coercive means before the expiration of 14 days from the service of the default costs certificate."

[6] On that same day, AGI filed a notice of application for stay of execution of the order for seizure and sale. The grounds for this application were as follows:

> "(i) There is a realistic prospect of successfully disputing the bill of costs which underlies the default costs certificate;
>
> (ii) There is a great risk of injustice to [AGI] in facing a bill of costs which contains a perversely high quantum given the nature of the application to which the bill of costs relates;
>
> (iii) The risk of injustice is heightened by [BB&Co's] possession of the order for seizure and sale, they having already directed a bailiff to seize [AGI]'s goods."

[7] Mr Andre Sheckleford swore to an affidavit on 15 March 2018 in support of the application for stay of execution of the order of seizure and sale. He referred to the applications in the Court of Appeal, the bill of costs laid by BB&Co which flowed from those applications, and the fact that no points of dispute had been filed which resulted in the default costs certificate being issued. The reason he gave for AGI's failure to file points of dispute was that the bill of costs had not come to the attention of AGI's attorneys, Hart Muirhead Fatta (HMF), until receipt of MH's default costs certificate on 12 March 2013. He pointed out that AGI had then filed the applications to set aside and to stay the said default costs certificate.

[8] He complained that despite those applications, and the letter sent by BB&Co to HMF on 12 March 2018, which in his understanding, had intimated that no steps would have been taken by BB&Co for 14 days, BB&Co had, nonetheless, proceeded to extract

the order for seizure and sale. He deponed that AGI felt constrained to file an appeal from the decision of the acting registrar, and had done so timeously. He indicated that he was relying on rules 46.4 and 65.12 and 65.22 of the CPR to support the applications that had been filed on behalf of AGI.

[9] Mrs Angel Beswick-Reid, an associate at BB&Co, responded to Mr Sheckleford's affidavit, in affidavits filed on 19 and 20 March 2018, objecting to the stay of execution of the order for seizure and sale and also to the application to set aside the default costs certificate.

[10] In the affidavit filed 19 March 2018, Mrs Beswick-Reid indicated that there were no valid grounds to set aside the default costs certificate. She set out the history of the litigation between the parties in the courts indicating that the trial of the substantive matter had lasted 25 days, and that judgment had been obtained in favour of MH. She specifically referred to the applications filed by BB&Co, before the Court of Appeal, to strike out the appeal filed by AGI for failure to comply with the provisions of the rules and orders of the court. She commented on the consistent "wanton abuse of the processes of the Court by [AGI]" and the fact that AGI had, in the past, paid little regard to court orders, rules and procedures, and had constantly sought relief from the court for their "tardiness, noncompliance and inefficiency." It was as a result of AGI's failure to adhere to the rules that the default costs certificate had been issued.

[11] She stated that AGI had no basis upon which to apply to set aside the default costs certificate which had been validly obtained. She stated that the reason given for

failing to file the points of dispute, which was that the bill of costs had only come to HMF's attention when served with the default costs certificate, was unacceptable. She said this was a further indication of their inattention to the proper processes in the litigation in the courts.

[12] In her affidavit filed 20 March 2018, Mrs Beswick-Reid stated that she was relying on section 51 of the Judicature (Supreme Court) Act which states that an order for costs is a money judgment and can be enforced accordingly. She further relied on rules 45.2(a), 64.2(3) 43.1(2) and 43.4 of the CPR to state that MH was proceeding properly to enforce the order for costs. She further stated that the rules do not require that the enforcement of the default costs certificate must wait until 14 days after it has been issued.

[13] She indicated that the prejudice to MH was greater than that to AGI, as BB&Co was in possession of an order for seizure and sale, and the bailiff had already been directed to seize AGI's goods. Mrs Beswick-Reid also deponed that the stay of execution was opposed as the order had not only been delivered to the bailiff, but had already been partially executed. There was, she argued, no realistic prospect of successfully disputing the bill of costs. Furthermore, she stated that AGI had been informed of the decision taken by the deputy registrar of the Court of Appeal who had already refused to set aside the default costs certificate on the basis, that it had been validly granted.

[14] On 20 March 2018, the hearing of the application for stay of execution of the order for seizure and sale before Batts J was adjourned until 25 April 2018, and the stay

of execution was extended further by the learned judge, on condition that AGI paid into court, on or before 6 April 2018, the amount of $1,600,000.00. That amount was stated to be without reference to any amount claimed or to be assessed as costs in the matter. Other procedural orders were also made.

[15] On 14 May 2018, Batts J heard the application fully, and he made the following orders:

> "(1) Stay of execution granted of the order for seizure and sale granted in respect of the Default Costs Certificate" (12/3/18).
>
> (2) Order for stay of execution is granted on condition that the 1.6 million dollars already paid into court will remain until further orders of the Court.
>
> (3) Question of Costs reserved to the hearing of the appeal against the Order for Seizure and Sale.
>
> (4) Date for hearing of Appeal against the Order for Seizure and Sale, set for May 29, 2018, for 3 hours."

[16] On 25 July 2018, Pusey JA (Ag), granted a stay of execution of the default costs certificate in this court (in application no 57/2018), until the determination of the application to set aside the said certificate. That stay of execution of the certificate remains in place. The application has been heard and the parties are awaiting a decision from the full court.

[17] On 29 March 2019, the appeal against the stay of execution was determined by Simmons J, wherein she, *inter alia*, set aside the order for seizure and sale with costs to AGI.

The appeal

[18] This appeal was filed by BB&Co for MH against the decision of Batts J on 14 May 2018, based on the following six grounds:

> "(i) The Learned Judge erred in his interpretation of the facts and as such arrived at the wrong conclusions of both fact and law;
>
> (ii) The Learned Judge failed to consider that the Learned Registrar of the Supreme Court did not fall into error when she granted the Order for Seizure and Sale pursuant to a validly obtained Default Costs Certificate;
>
> (iii) The Learned Judge misdirected himself with regards to the enforcement of Costs Orders, in that whilst the Order remains valid then there should be no reason for the receiving party to be prejudiced by the paying party refusing to pay said costs in circumstances where it is the receiving party that would suffer the greater prejudice and further that it was the default and failure to comply with the rules of the Court that led to the Costs Order being granted in the first place;
>
> (iv) The Learned Judge erred in failing to treat the hearing of the application for a Stay of the Order for Seizure and Sale as the hearing of the application to set aside the said order, when the facts and arguments are the same and further in circumstances where each day that the receiving party is without their costs then ... [MH] ... is further prejudiced;
>
> (v) The Learned Judge failed to recognize and appreciate that in any event no in justice could possibly arise from the payment of the Default Costs Certificate since a Consent Order in the Court of Appeal was acknowledged by ...[AGI], in the Court below, which Order indicates that even if ... [MH] ... were unsuccessful in the Court of Appeal, [AGI] would pay to [MH] five (5) days trial Costs for two Counsel and the costs of one instructing Attorney-at-Law which amount would be far greater than the amount of this

> Default Costs Certificate and that therefore any payment on this Default Costs Certificate would at worst, become a credit against the payment in the Court of Appeal;
>
> (vi) The Learned Judge failed to appreciate that [AGI]... not having filed Points of Dispute in the Court of Appeal, with regard to the Bill of Costs which caused the Default Costs Certificate to be granted, had an insurmountable task and a high threshold to meet in seeking to have in set aside, and accordingly there should be no reason why the enforcement of the said order should have been stayed."

[19] MH had also challenged the fact that, as at the date of the filing of the appeal, the learned judge had not given any reasons for his decision to stay the order for seizure and sale. However, the learned judge has since submitted the written reasons for his decision given on 14 May 2018.

[20] In response to MH's appeal, Mr Sheckleford filed two affidavits, one on 22 October 2018, and the other on 11 October 2019. In his affidavit filed on 22 October 2018, he reminded the court that on 25 July 2018, Pusey JA (Ag) had stayed the underlying default costs certificate, until the substantive hearing of the application to set aside the said default costs certificate in this court. In his affidavit of 11 October 2019, Mr Sheckleford indicated that:

> 1. Simmons J had heard the appeal and had set aside the order for seizure and sale.
> 2. There is therefore no order for a stay of execution in place, as Batts J's order was no longer extant, and

would have no effect upon the determination of the appeal by Simmons J;

3. MH had sought permission to appeal Simmons J's order. However, even if that application and/or the subsequent appeal was successful, and the order for seizure and sale was restored, the order of Batts J would not be restored;

4. The current appeal has no substratum, it has no practical consequence, and continued pursuit of it is a waste of the court's time;

5. The above assertions were set out in a letter to BB&Co requesting them to act prudently and to withdraw the appeal but failing that, they were told that an application to strike out the same may be pursued.

[21] One may have thought that subsequent events would have overtaken the purpose of and interest in this appeal. But, as there is an outstanding application to appeal Simmons J's order, and the outcome of the hearing of the application to set aside the default costs certificate before this court is also still awaited, perhaps a ruling from this court on this procedural appeal may be useful. Before embarking upon an analysis of the issues that have arisen in this appeal, it is useful to examine Batts J's reasons for judgment.

Decision of Batts J

[22] Batts J described the application before him correctly as "one small part of never-ending litigation" between the parties. He referred to the chronology of events as outlined in paragraph [2]-[14] herein, and noted that what was before him, was an application to stay execution of the order for seizure and sale, pending the hearing of the application to set aside the said order.

[23] Batts J noted that Mr Paul Beswick of BB&Co had made an application before him to cross-examine Mr Sheckleford on his affidavits, which the learned judge granted. That cross-examination, Batts J said, had not, in any way, significantly impacted the issues he had to consider. The learned judge also noted that there had been an application by BB&Co to treat the application for stay as the hearing of the application to set aside the order, on the basis that the same issues would have to be considered in both situations. HMF opposed that application on the basis that the application to set aside the order for seizure and sale was not properly before the court. Batts J upheld with that objection. AGI, he said, would be entitled to say that they may have had additional authorities that they may have wished to use at the substantive hearing.

[24] Batts J referred to several authorities dealing with the test for the determination as to whether a stay should be granted, such as: **Cable & Wireless Jamaica Limited (t/a Lime) v Digicel (Jamaica) Ltd (formerly Mossel Jamaica Limited)**, (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 148/2009, Application No 196/2009, judgment delivered 16 December 2009, and **Combi (Singapore) Pte Limited v Ramnath Sriram and Another** [1997] EWCA Civ 2164.

The established principles are that some prospect of succeeding on the appeal should be shown; that the decision whether to grant a stay was a discretionary one; the risk of injustice to both parties, as well as the risk of irremediable harm, were important considerations; and the strength of the appeal was also an important factor.

[25] Batts J said it was clear that, firstly, one should identify if there is any merit disclosed, and therefore a realistic prospect of succeeding on the application to set aside the order for seizure and sale. He referred to the two grounds posed by HMF on the application: (1) the order for seizure and sale should not have been issued as the rules precluded such an order unless associated with a money judgment; and (2) the rules also precluded the order being made before the expiration of 14 days after service of the default costs certificate.

[26] He set out rule 46.4(1) of the CPR which states:

> "A judgment creditor may recover on a writ of execution –
>
> (a) the balance of any money judgment (including costs);
>
> (b) fixed costs in accordance with rule 65.3; and
>
> (c) interest on a money judgment."

Batts J said that the wording of the rule must mean that the money judgment is to be seen as a money judgment as well as one for costs, otherwise, a money judgment could not be enforced unless it included costs. That latter interpretation he found to be untenable, and he referred to the dictum of Sykes J (as he then was) in **Gordon**

Stewart OJ v Noel Sloley Snr and Others [2016] JMSC Civ 50, where he stated at paragraph [104] that:

> "It is important to recall that an order for the payment of costs is a judgment debt within the meaning of section 51 of the JSCA and therefore enforceable like any other money judgment (**Branch Developments Ltd v The Bank of Nova Scotia** [2014] JMSC Civ 40 [30]-[32] (McDonald Bishop J (now Justice of Appeal))."

[27] He referred to several rules of the CPR which had been brought to his attention, namely, rules 45.2, 64.2(3), 43.1 and 43.4. He indicated that these rules all supported his construction of the relevant rule, 46.4(1) above. He concluded that HMF's first ground in the application did not have any prospect of success.

[28] The learned judge dealt with the second ground relating to the true and proper construction of rule 65.12(b) of the CPR, which states:

> "A party must comply with an order for the payment of costs within 14 days of –
>
> (a) ...
>
> (b) if the amount of those costs (or part of them) is determined in accordance with rule 65.10 (basic costs) or rule 65.13 (taxation - general), the date of the certificate which states the amount."

Batts J said that the submission made by counsel of HMF for AGI that the order for seizure and sale ought not to have been issued prior to the expiration of 14 days from the date of the issue of the default costs certificate was promising.

[29] Batts J also referred to the letter written by BB&Co to HMF on 12 March 2018, an important aspect of which states:

> "We wish to bring to your attention CPR 65.12 which states that a party must comply with an order for the payment of costs within 14 days of the date of the certificate. Accordingly we provide our banking information herein to facilitate payment:-…"

Batts J stated that the letter suggested that BB&Co shared or induced HMF's understanding of the rule. The learned judge said it could be argued that the said letter had encouraged AGI to "think that they had 14 days in which to pay".

[30] Batts J decided that the second ground of appeal had merit. He was not impressed with BB&Co's submission that the stay should not be granted as it would wreak injustice, and in any event noted, that there was this unusual order in the Court of Appeal, indicating that whatever the outcome of the appeal, MH would recover substantial costs, and so, even if the order for seizure and sale was set aside, the costs consequent on the default costs certificate could be set off against the cost of the substantive matter.

[31] Batts J assessed the risk of payment of costs to MH against non-payment by AGI. He commented on the significant costs which had been ordered in respect of a hearing conducted over two days, and indicated that though he was unaware of what the registrar would assess as costs in the matter, and therefore what the ultimate costs order would be, he did not think that the stay of the execution of the order for seizure

and sale should be refused by reason of the possible set off of costs in the substantive appeal.

[32] Batts J decided that the stay ought to be granted, but that AGI should be ordered to pay money into court as a condition of the grant of the stay. This payment would ameliorate any possible loss if AGI was to go into receivership, or was unable to pay the default costs. The payment of $1,600,000.00 was ordered as a condition of the stay, but Batts J made it clear, however, that the amount was not to be regarded as a pre-estimate of the costs ultimately to be assessed. He also ruled that the costs of the application were to abide the outcome of the substantive hearing to set aside the order for seizure and sale.

Submissions in this appeal

BB&Co for MH

[33] In the written submissions filed by BB&Co on behalf of MH, counsel referred to and relied on the relevant provisions of the CPR namely rules 46.4(1)(a) and (b); 45.2, 64.2(1) and 65.13. It was counsel's general position that the default costs certificate, which undergirds the order for seizure and sale, was validly obtained and was extant at the time the impugned order was made. As a consequence, the costs order was, therefore, enforceable and the rules in the CPR make that clear. Counsel submitted that there was no cogent evidence that AGI would suffer great prejudice, or any prejudice at all, if the sum was paid, certainly there was no evidence that suggested financial ruin.

[34] Counsel argued that the reason AGI had advanced for allowing the default costs certificate to issue was not a good reason. Counsel referred to the several authorities which confirmed that without a good reason, a stay of execution should not be granted, as MH ought not to be denied the fruits of her judgment without a good basis (see **Ferrnah Johnson-Brown v Marjorie McClure** [2015] JMCA App 19 and **Caribbean Cement Company Ltd v Freight Management Limited** [2013] JMCA App 29). He relied further on the case of **The Attorney General v Universal Projects Limited** [2011] UKPC 37 for the proposition that "inexcusable oversight can never amount to a good explanation," nor could "administrative inefficiency" (see **Andrew Mitchell MP v News Group Newspapers Limited** [2013] EWCA Civ 1537). He therefore submitted that the learned judge was palpably wrong. The decision for stay of execution for the order for seizure and sale should be set aside, and MH should be allowed to enforce the default costs certificate.

[35] Before this court, counsel reiterated his argument that found favour before Batts J, that an award of costs was a money judgment, and also repeated his argument in relation to the interpretation of rule 65.12 of the CPR, which had not found favour with Batts J. He further submitted that there was no rule precluding the issue of the order of seizure and sale immediately upon obtaining the default costs certificate. Counsel also indicated that as the writ of seizure and sale had been executed "there was nothing to stay".

HMF for AGI

[36] Counsel for HMF, on AGI's behalf, referred to the fact that the learned judge, in considering whether to grant the stay of execution, correctly focused on two main issues, namely: (1) whether the appeal had some prospect of success; and (2) the risk of injustice to the parties.

[37] Counsel referred to the six grounds of appeal filed on behalf of MH and addressed them sequentially as follows:

1. Ground (i) was vague, and there was no evidential or other basis to suggest that the learned judge had not understood or appreciated the facts before him.
2. The issue in ground (ii) as to whether the acting registrar erred in granting the order for seizure and sale, was the very issue that was on appeal before Simmons J, and was also the subject of the application for permission to appeal to this court. Batts J had found that there was some prospect of success on appeal, and had set out why he had arrived at that conclusion, which was correct in law.
3. On ground (iii) counsel submitted that the learned judge had considered the issue of prejudice, and found that greater harm would have resulted if he had not granted the stay. Indeed, without the grant of the stay, the appeal of the order for stay of execution would be rendered otiose.

4. Ground (iv) was conceptually flawed as the application for a stay, was, by definition, temporary, and examines the prospect of success of the appeal and the relative injustice to the parties, whereas the application to set aside is entirely different. The result of the appeal is definitive, as the order is final in nature.

5. The learned judge had addressed the issue raised in ground (v) as to whether substantial costs would have been awarded to MH regardless of whether AGI's appeal is successful. After considering that issue, the learned judge, in the exercise of his discretion, found, that the failure to grant the stay would result in greater prejudice to AGI.

6. The presumption in ground (vi) that the task of setting aside the default costs certificate was insurmountable, was not factually accurate. Pusey JA (Ag) had already granted a stay of the default costs certificate in this court, which suggested that in the opinion of the learned judge of appeal, that AGI had some prospect of success in its application before this court to set aside the default costs certificate.

[38] Counsel submitted that the grant or refusal of a stay of execution was the exercise of the judge's discretion. Accordingly, it was impossible to state that in exercise

of that discretion, Batts J had erred or was plainly wrong, as he had applied the law correctly, and the risk of injustice clearly favoured the grant of the stay.

Issues

[39] In all the circumstances, the issues in this procedural appeal appear to me to be as follows:

> Whether the judge erred in:
>
> a) failing to recognize that the order for seizure and sale had been issued pursuant to a validly obtained default costs certificate, and therefore, ought not to be restrained, as the prejudice in so doing was greater to the receiving party than the paying party (grounds (i), (ii), and (iii));
>
> b) failing to consider properly or at all the fact that the order of costs in the Court of Appeal was that certain costs would be paid to MH whether the appeal was successful or not (ground (v));
>
> c) failing to treat the hearing of the application to stay the order of seizure and sale as the hearing to set aside the order for seizure and sale (ground (iv)); and
>
> d) failing to appreciate that in the circumstances of this case, no points of dispute having been filed, the

application to set aside the default costs certificate was unlikely to succeed (ground (vi)).

Decision and analysis

[40] In **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042, at 1046, Lord Diplock gave guidance on how the appellate court ought to treat the exercise of the discretion of the single judge, and when it was appropriate for the court to interfere with the decision. He said that:

> "It [the Court of Appeal] may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."

[41] There have been several authorities dealing with how the courts should balance the competing contentions of the parties when considering whether to grant or refuse a

stay of execution of a judgment or order of the court. It has been decided in more recent cases that the issue of prejudice, irremediable harm and the interests of justice are important factors for the court's consideration. In **Combi (Singapore) Pte Limited v Ramnath Sriram**, Phillips LJ said this:

> "In my judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice."

[42] In this matter, Batts J exercised his discretion to grant a stay of execution of the order for seizure and sale. The exercise of that discretion is an unfettered one, but of course, it must be exercised judicially. In order to assess whether that was done, it is necessary to examine the fundamental bases for the grant of a stay. Was there, at the time, a real prospect of success in the application to set aside the order, and was there any cogent or credible information before Batts J, that the appeal would be nugatory if the stay was not granted. The above dictum of Phillips LJ is apt and relevant to the issues herein. The real issue, in my opinion, is whether there is merit in the application

that was before Batts J, and where does the greater prejudice and/or irremediable harm lie?

[43] With regard to whether there is a real arguable case on appeal, there are matters which seem to have completely overtaken the main issue on this appeal. Firstly, Batts J granted an ex parte order for a stay of execution of the order for seizure and sale, until the following day, when the matter was heard inter partes. That hearing and the orders resulting therefrom, namely, the extended stay of execution, was to remain until the hearing of the application to set aside the order for seizure and sale before Simmons J. That application was heard by Simmons J on 29 March 2019, and she has set aside the said order for seizure and sale. An application for permission to appeal that order was duly filed on 29 March 2019, and has been heard by this court, and the application has been refused (see **Marilyn Hamilton v Advantage General Insurance Company Limited** [2019] JMCA App 30).

[44] The said ground that found favour with Batts and Simmons JJ, also found favour with this court. The court has agreed with Simmons J, that the order made for seizure and sale was premature. Batts J found that position was arguable, with some prospect of success. Looking at the matter with the facts as they have unfolded, it would be difficult to find fault with that ruling. In my view, one ought not to give any interpretation of a rule that would result in an absurdity, or one that would lend itself to it being redundant or otiose. AGI ought to have been able to get the benefit of the 14 day time period within which to comply to pay the order for costs, before the bailiff attended on their premises to seize and sell their goods. Once the court finds that that

was arguable, then Batts J's decision to stay execution of the order for seizure and sale, was reasonable in all the circumstances, and could not be faulted.

[45] It is also of some significance that Pusey JA (Ag) granted a stay in this court of the default costs certificate, which did indicate that he was of the opinion that the application to set aside the default costs certificate had some prospect of success. This was contrary to the submission of counsel for MH, that it was not possible to reach the threshold to set the certificate aside. That hearing has been completed in the Court of Appeal and an order is awaited. As a consequence, although the default costs certificate may have been initially validly issued, an application has been filed to set it aside on the basis that there is good reason. One must consider that if the application to set aside the default costs certificate was to be allowed, then the order underpinning the order for stay of execution would have gone. The substratum of the stay would be non-existent.

[46] In those circumstances, the risk of injustice must be in favour of AGI. If the stay had not been granted, and the bailiff had proceeded to seize and sell the goods of AGI, in circumstances where the default costs certificate on which it was based could have been overturned, the harm to AGI had that occurred, would have been great, and the prejudice severe. I too am not persuaded that the unusual costs order in this court that MH should get substantial costs even if unsuccessful on appeal, should have impacted the exercise of the discretion of the learned judge. Additionally, it was entirely within the discretion of Batts J, whether he wished to treat the application which was before him for stay of execution of the order for seizure and sale, together with the application

to set aside the order for seizure for sale, which was not before him. One could not say, that in dealing with those matters as he did, he was palpably wrong.

[47] It is important to state that the authorities make it clear that if the execution process has proceeded on a flawed basis it ceases to have effect. Once the basis for the enforcement falls away, the enforcement become irregular and the general rule is that it must be set aside (see Halsbury's Laws of England, Volume 17(1), Fourth Edition, at paragraph 215). Accordingly, on the making of the order by Simmons J to set aside the order for seizure and sale, it having been premature, the enforcement become irregular and must be set aside. What follows from this is that the order requiring payment of $1,600,000.00 on condition of the grant of the stay of execution to secure payment of the costs, the basis of the order must also be set aside and the monies paid into court by AGI must be refunded to them, and I would so order.

[48] In the circumstances of this case, where this matter stands now, I must say that I tend to agree with HMF that this appeal appeared to be a waste of the court's time.

[49] In any event, the appeal must therefore be dismissed, with costs to AGI to be taxed if not agreed.

BROOKS JA

[50] I have read in draft the judgment of Phillips JA. I agree with her reasoning and conclusion and have nothing further to add.

McDONALD-BISHOP JA

[51] I too have read the draft judgment of Phillips JA and agree with her reasoning and conclusion.

PHILLIPS JA

ORDER

1. The appeal is dismissed
2. The sum of $1,600,000.00 paid into court by Advantage General Insurance Company Limited shall be refunded to them forthwith.
3. Costs to the respondent, Advantage General Insurance Company Limited, to be taxed if not agreed.