[2010] JMCA App 25

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 93/2010

APPLICATION NO. 138/2010

BETWEEN	JAMALCO (CLARENDON ALUMINA WORKS)	APPLICANT
AND	LUNETTE DENNIE	RESPONDENT

Kirk Anderson and Emile Leiba instructed by DunnCox for the applicant

Raphael Codlin and Miss Melissa Cunningham instructed by Raphael Codlin & Co. for the respondent

24 and 27 August, 9 September and 23 November 2010

IN CHAMBERS

MCINTOSH, JA (Ag)

[1] This is an application by the appellant for a stay of execution of the judgment of Anderson, J herein, delivered on 2 July 2010, pending the determination of its appeal. The application was heard on 27 August and was granted, in part, on 9 September 2010 with a promise to provide written reasons for my decision. I seek now to fulfill that promise.

Background

[2] The respondent and her husband filed an action in the Supreme Court on 23 July 2004, claiming (i) damages for breach of contract, (ii) specific performance of the said contract and (iii) interest on the damages awarded at a rate of 27%.

[3] The claim arose out of an agreement entered into between the respondent (the second claimant in the action) and her husband (now deceased), on the one part, and the applicant (the defendant in the action) on the other part, "whereby the defendant would acquire property belonging to the claimants at Whitney in the parish of Clarendon" in exchange for other land of a certain size, at McGilchrist Pen in the said parish. The agreement also provided, inter alia, for (i) payment for cash crops (the claimants being subsistence farmers at the time) and (ii) the construction of a replacement dwelling house and a fowl coop, to certain specifications.

[4] The respondent maintained that the applicant breached the contract as the house it provided was not in compliance with the agreement "in that a house of equal total area was not properly constructed and the fowl coop was not provided". She maintained that notwithstanding her repeated demands, the applicant failed to fulfill all

the terms of the agreement particularly the provision of "appropriate property for the claimants".

[5] After a three-day hearing before Anderson, J, judgment was awarded to the claimant (clearly a reference to the 2nd claimant) on 2 July 2010, in the following terms:

> "It is hereby adjudged
>
> 1. General damages in the amount of $1,250,000.00 to the Claimant for Defendant's breach of contract in failing to provide a replacement house of equal total area.
>
> 2. General damages in the amount of $1,250,000.00 to the Claimant for Defendant's breach of contract in failing to provide appropriate acreage of land.
>
> 3. General damages of $500,000.00 to the Claimant for Defendant's breach of contract in failing to rebuild chicken coop.
>
> 4. Interest on the sums awarded as General Damages at 6% per annum from August 4, 2004 to 21st June 2006 and 3% per annum from 22nd June 2006 to the date of judgment.
>
> 5. The Defendant is to allow the Claimant to remain at Denbigh Crawle until October 31, 2010.
>
> 6. The Claimant is to take up the resettlement premises at Lot 1 McGilchrist Pen.
>
> 7. The Defendant is to transfer Lot 9A McGilchrist Pen to the Claimant on or before October 31, 2010 or such further date as this Court may by order declare.

8. The Defendant is to construct the chicken house on the resettlement property at McGilchrist Pen within thirty days after the Claimant takes possession of the resettlement house.

9. Cost of these proceedings to the Claimant to be taxed if not agreed.

10. Claim of the 1st Claimant is struck out.

11. Liberty to apply."

[6] Aggrieved by this decision, the defendant filed notice and grounds of appeal on 27 July 2010 and on the following day, 28 July, filed an application in the Court of Appeal for a stay of execution of the judgment. Then, anxious to have the application heard and being of the view that a hearing date could be more speedily obtained in the court of trial, the applicant filed a similar application in the Supreme Court on 29 July 2010 and, indeed, was able to secure a date for hearing on 5 August 2010. The hearing took place before Marsh, J who refused the application on 11 August 2010.

A Preliminary Point

[7] In the face of that refusal, the applicant opted to pursue the application filed in the Court of Appeal on 28 July 2010 and it was set for hearing on 24 August 2010. However, before the applicant was heard,

the respondent's attorney raised a two pronged preliminary point *which* required the court to consider:

I. whether a single judge of this court was seized with jurisdiction to hear an application for stay in circumstances where an application was made in the court below and was refused; and

II. whether the judgment debt had already been executed thereby rendering an application for stay of its execution an exercise in futility.

[8] In sum, Mr Codlin submitted that a judgment debtor who wishes a stay of execution of a judgment or order must do two things:

i. lodge an appeal against the judgment; and

ii. make an application either to the Court of Appeal or to a judge in the Supreme Court.

He is not entitled to make an application before both courts, as was done in this case argued by Mr Codlin. Rule 2.11(1)(b) of section 2 of the Court of Appeal Rules, 2002 ("the CAR"), which gives a single judge of the court power to grant a stay of execution, has no relevance to the instant case as an application had already been made before a single judge. When Marsh, J refused the application in the court below, he granted leave to appeal but no appeal against that order has been filed. The only court which now has jurisdiction to hear an application for stay, in these circumstances, is the court consisting of three judges of appeal.

[9] He found support for his submission in the Court of Appeal case of **Flowers Foliage & Plants of Jamaica Limited and Ors v Jamaica Citizens Bank Limited** (1997) 34 JLR 447 where the court gave the two options open to an intending applicant for a stay of execution pending the hearing of the appeal as (i) an application first to the court below and then, on a refusal, to the Court of Appeal consisting of three judges or (ii) an application to be made after the filing of the appeal directly to a single judge of appeal. Since this applicant first pursued its application in the Supreme Court, Mr Codlin submitted, the next step open to it was an application before the full court and not to a single judge in chambers.

[10] Interestingly, reference was also made to the **Flowers** case by the applicant's attorney-at-law, Mr Anderson, pointing out similarities between the instant case and **Flowers** where an application had been made in the Supreme Court followed, on its refusal, by a similar application to a single judge of the Court of Appeal who granted it, and the order when subsequently challenged was not discharged or varied by the full court. A further point of similarity is that there had been no appeal from the decision of the judge in the court below who had refused the application.

[11] Mr Anderson contended that there is concurrent jurisdiction in both courts to hear applications for a stay and this is so whether or not there is

an appeal from the judgment in the court below (see **Tuck v Southern Counties Deposit Bank** (1889) 42 Ch. 471 referred to in **Flowers** as oft-cited authority for the proposition that an application may be made before any appeal has been filed). As the rules make it abundantly clear that either court has jurisdiction to hear the application, Mr Anderson submitted, there is nothing wrong in making an application in the Supreme Court and thereafter invoking the powers of a single judge in the Court of Appeal.

[12] Furthermore, there is no longer a requirement that the application must first be made in the court below and for this submission he relied on **Kingsley Thomas v Collin Innis** – SCCA No 99/2005 where K. Harrison, JA, at paragraph 5 of his judgment delivered on 14 February 2006, said:

> "Rule 2.11(1)(b) of the COAR 2002 makes it quite clear that a single judge of the Court of Appeal may make orders for a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal. These Rules unlike the former contain no requirement that a stay must first be applied for in the court below."

[13] In relation to the second prong of the respondent's preliminary point, Mr Codlin asked the court to consider an excerpt from Black's Law Dictionary as to the meaning of ***"execution"*** which is stated therein as ***carrying out some act or course of action to its completion***. In this case, he submitted, the bailiff had already carried out execution leaving nothing to be stayed. The respondent had filed a document showing that

the bailiff had completed execution in that he had endorsed it at the back with the word "settled" and had affixed his signature signifying complete settlement of the process. There is therefore no point to this application, he argued.

[14] Further, Mr Codlin submitted, the order of the Supreme Court that the sum is to be paid to the court is evidence that from the moment that the bailiff completes his work, the sum is vested in the respondent and there is no authority in this court to seize the respondent's goods. The Accountant General is a mere trustee of the funds and that trusteeship is synchronized when the Registrar of the Supreme Court orders the Accountant General to pay it to the creditor. A stay cannot then arise. A stay can only arise if the process is incomplete. The bailiff carried out his duties, collected his fees according to law and the court is now being asked to say that that process is to be undone.

[15] It was Mr Anderson's contention, in response, that there has been no seizure of the debtor's property nor has there been any sale thereof. There is a monetary aspect of the judgment as well as a property aspect which is not yet required to be brought to fruition. He placed reliance on a definition of **"execution"** to be found in the third edition of Words and Phrases Legally Defined by John B. Saunders which reads as follows:

> "Execution means quite simply the process for enforcing or giving effect to the judgment of the court and it is "completed" when the judgment creditor gets the money or other thing awarded to him by the judgment."

Accordingly, Mr Anderson submitted, execution is not complete until the judgment creditor has received the benefit of the judgment and in this case, the judgment creditor has not yet received that benefit. Everything must have been done that the court required to be done (see **Lord Elgin Hotel Limited v Minister of National Revenue** (1969) C.T.C. 24). Further, Part 43 of the CPR, read with Part 46, provides how a judgment should be enforced. In this case, a writ of execution was obtained and a return was made to that writ which shows that there was actually no seizure of any goods.

[16] Further, he submitted, no money was paid over to the judgment creditor but was paid into court instead, and Mr Codlin's submission that money was never paid into court; that payment into court applied only at the Resident Magistrate's level and that nothing in the writ of seizure and sale required payment into court was inconsistent with the respondent's averment in paragraph 5 of her affidavit dated 13 August 2010 where she stated that she swore to an affidavit that execution had already taken place and that the bailiff had paid the sums into court. Supporting documents were even exhibited to her affidavit (see also Mr Codlin's submission at paragraph 14 above). So, it is clear, Mr Anderson submitted,

that the funds were paid into court where they still remain. The process of executing the judgment is therefore by no means complete. It would not be completed until the respondent or her attorneys had the money in their possession. Mr Anderson also referred to the case of **Whitaker v Caribbean Sea Island Cotton Company Limited** (BB 1991 HC 64) where although there had already been a seizure of goods, the High Court of Barbados still granted a stay of execution.

[17] Finally, counsel referred to Halsbury's Laws of England, 4th edition, (paragraph 119, concerning the three forms of return to a writ, namely, a return indicating (a) the seizing and selling of goods, (b) no goods or (c) goods seized but unsold; paragraph 195 on stay or suspension of execution – a halt on enforcement proceedings; and paragraph 204 dealing with execution being superseded on payment). It was Mr Anderson's contention that once money has been paid into court before the actual sale of the goods, the execution of the writ would have been superseded. In other words, the writ would not have been executed.

Decision on the Preliminary Point

[18] I was unable to agree with Mr Codlin's submission that the applicant's reliance on rule 2.11(1)(b) was misconceived. By virtue of that rule, the applicant's application to a single judge of the Court of Appeal for the grant of a stay of execution of the judgment of Anderson, J. was

to be treated as independent of its application in the court below. When the rule speaks of a single judge, it is a reference to a single judge of the Court of Appeal and does not include a judge of the Supreme Court sitting alone. It is therefore entirely incorrect to say that the matter had already been heard by a single judge and was refused.

[19] Further, Mr Codlin's reliance on **Flowers** as authority for the proposition that the applicant had first to apply to the court below before coming to the Court of Appeal is misplaced. **Flowers** pre-dated the new CAR and that proposition no longer holds good. As Mr Anderson correctly submitted, there is no requirement under the new rules that the application must first be made in the court below (see **Kingsley Thomas**). However, having already filed the application in the Court of Appeal, it is my view that the applicant ought to have pursued that application instead of invoking the jurisdiction of the judge in the court below. If it was felt that the matter needed to be addressed urgently, then the applicant need only do what it eventually did which was to plead the urgency of the matter and seek an early date from the Registrar. But, its action in approaching the court below did nothing to oust the jurisdiction of the single judge to hear the application. That power is vested in the single judge by virtue of the provisions of rule 2.11 and it is to be noted that the decision of Downer JA granting a stay in **Flowers,** after it was refused by Chester Orr, J in the court below, was upheld by the full court as having

been based on provisions under the old rules (rule 33(1) similar to the current rule 2.11(1)(b)).

[20] To my mind, it is of significance that the court in **Flowers** did not express the two options as alternatives, so that although the application before Chester Orr, J had been made before the appeal was filed, **Flowers** nevertheless provides some support for the applicant's contention that after the refusal by Marsh, J it was entitled to have recourse to the provisions of rule 2.11(1)(b).

[21] I also disagreed with Mr Codlin that execution of the judgment had already taken place rendering the application for its stay useless. The process for the recovery of the judgment sum had commenced but it was not complete. At one point in his submissions, Mr Codlin himself seemed to have acknowledged this. I accepted that the process would only have been completed when everything had been done which "by the terms of the judgment is required to be done" (see Stroud's Judicial Dictionary of Words and Phrases 4th edition at page 966 as also per Jackett, P in **Lord Elgin Hotel Limited**). In my view, this was not incompatible with the definition advanced by Mr Codlin as it too spoke of carrying out some act or course of action to its completion. I accepted that execution would be completed when the judgment creditor received the money or other thing awarded to him by the judgment. In the instant case, the course of

action was not complete and would not be complete until the respondent had in hand the benefit of the judgment. At the end of the day, it was therefore for the court to determine whether or not it ought to exercise its discretion in favour of the grant of a stay of execution. In the event, the preliminary point failed and I ruled that the application should proceed.

[22] As it was necessary, in my view, to preserve the status quo until the application was completed, I made an interim order that the judgment sum paid by the bailiff to the Accountant General in this matter be held pending further order of the court. The hearing then continued on 27 August and concluded on 9 September 2010 with the result indicated in paragraph 1 above.

The Application

[23] The application which was pursued by the applicant, with leave, was an amended notice of application for court orders filed on 13 August 2010 in which it sought the following four orders:

> "1. This Application be heard during this Court's long vacation and that if same is to be heard by means of an oral hearing that the date for such oral hearing is scheduled before the period of seven days notice to both parties has expired.
>
> 2. A stay of execution of the Judgment of the

Honourable Mr Justice Anderson delivered on the 2nd day of July 2010, pending a determination of the Appeal herein.

3. The sum of $3,750,701.14 paid into Court by the Appellant and pursuant thereto, paid over to the Accountant General by the RM Bailiff for Kingston and St. Andrew, remain in Court with the Accountant General, or alternatively, be placed in a joint interest bearing account at a Commercial bank in the names of the Attorneys-at-Law for the Appellant and Respondent until the determination of Supreme Court Civil Appeal no. 93 of 2010 or until further order.

4. The costs of this application be costs in the Appeal."

[24] A total of seven grounds were set out in the application, the main ones being:

"i. ...

ii. The Appellant's/Defendant's Appeal has some prospect of success.

iii. There is a greater risk of injustice to the Applicant/Appellant if the orders being sought are not granted by the Honourable Court that there is to the Respondent if those orders are granted.

iv. If the Respondent/ Second Claimant is allowed to enforce the judgment prior to the hearing of this Appeal and the Applicant/Appellant subsequently succeeds on its Appeal, there would be no reasonable prospect of recovering the Judgment and costs from the Respondent/Second

Claimant, as on the Respondent's own evidence she is not evidence she is not currently earning an income or any significant income.

v. ...
vi. ...
vii. ..."

The other grounds spoke to the filing of the appeal, the applicable rules (for instance, rule 2.11(1)(b), rule 2.10(1)) and the urgency of the application (rule 1.4(3) and (4)).

The Affidavit Evidence

[25] The applicant relied on two affidavits filed by Emile Leiba in support of the application. The first was filed on 28 July 2010 with the original notice of application for court orders and the second on 13 August 2010 with the applicant's amended notice. The respondent also filed two affidavits opposing the application, one on 3 August and the other on 19 August 2010.

[26] In his first affidavit, Mr Leiba referred to the applicant's grounds of appeal as demonstrating that it has a real prospect of success on its appeal, in that the learned trial judge erred:

a. in determining that the applicant had been in breach of contract in having failed to build the replacement home for

the respondent (second claimant) to the required size as no claim had been made in that regard;

b. in determining the value of the replacement house, in the absence of any evidence as to the difference in value between the replacement house and the structure agreed under the terms of the contract, and determining the value based on "personal checks";

c. in determining the value of the acreage provided without evidence of the difference in value between the acreage provided and that agreed under the terms of the contract; and in assessing the value of the fowl coop without evidence of its value;

d. in failing to consider the fact that the respondent (second claimant) would only be entitled to half of any sum awarded as there was another claimant who would have been entitled had his claim been properly presented; and

e. in assessing damages for the breaches found as at the date of delivery of the judgment and not at the date of breach.

For these as well as the other reasons set out in the grounds of appeal, the applicant has a real prospect of success.

[27] However, the respondent disagreed with the applicant's assessment of its chances of success on appeal as, she said, "All the facts relied on by

the judge in handing down his judgment came out in the evidence at the trial and was admitted by the witness for the appellant/defendant in his evidence." Mrs Dennie further averred that "a writ of seizure and sale was obtained in this matter and was handed over to the Bailiff for the parish of Kingston and to the best of my knowledge at the time of my signing of this affidavit, execution of the writ has already began".

[28] In his second affidavit Mr Leiba averred that when the Resident Magistrate's bailiff visited the applicant's premises "in an attempt to enforce the judgment of the Honourable Mr Justice Anderson", the applicant, being faced with the prospect of execution of the writ, was "forced to pay the judgment sum" to the bailiff in order to prevent seizure of its property. Mr Leiba explained that the applicant was keenly aware that the sum having been paid, "it was open to the Respondent at any time, to remove the sum held by the Accountant General to whom it was delivered, upon the Respondent securing the requisite authorization". The applicant therefore thought it prudent to file an application in the Supreme Court on 29 July 2010, notwithstanding that a similar application had been made in the Court of Appeal the day before, because of the perception that there was "a greater likelihood" that an application for stay of execution could be heard more quickly in the court below than in the Court of Appeal. No execution of the goods earmarked by the bailiff for such purpose actually took place. Counsel also noted that the

computation of the sum to be paid by the applicant to stave off execution of the writ included a calculation of interest at a rate higher than that ordered by the court.

[29] Counsel further averred that on 12 August 2010, checks of the Supreme Court's records revealed that an order for payment out and an authority for payment out had been filed on that day and the applicant was concerned that once those orders were signed by the Registrar, the Accountant General would be obliged to make payment to the respondent unless such action is stayed. If not stayed and the payment was made, this would render the applicant's appeal nugatory.

[30] Furthermore, his affidavit continued, once said sum was paid to the respondent, "the likelihood of the applicant being able to recover the same or any portion thereof from the respondent is absolutely non-existent as she would not have nor could she be properly expected to have the means to refund the same or any part thereof". As, on her own evidence, the respondent earned an income from farming and, at the time of this matter, she was not farming and not earning any income, the applicant contended that it would not be able to recover the judgment sum from the respondent if it was successful in its appeal.

[31] Counsel maintained that there was no evidence to support a finding of breach of contract regarding the size of the replacement house. That

was not in keeping with the respondent's pleadings as her only complaint was in relation to the quality of the construction of the replacement house and not that it was not as large as it should have been. Further, there was no prejudice to the respondent if the orders sought were granted as the sum awarded could be kept in an interest-bearing account and if the respondent was successful she would be entitled to the judgment sum plus the interest which accrued thereon.

[32] Additionally, the respondent had her own complaints about the judgment and had filed a cross appeal. This in itself was an indication that no prejudice would be occasioned to the respondent if a stay was granted. In her counter- notice of appeal, filed on 10 August 2010, the respondent asked to be allowed to remain in the replacement house and, indeed, Anderson J had ordered that she be allowed to remain there until 31 October 2010. Finally, as there was no seizure and sale of the applicant's property by the bailiff under the writ of seizure and sale, the order cannot be said to have been executed and the money has not been paid out of court so the judgment has not yet been executed.

[33] In her further affidavit, the respondent challenged the applicant's assertion that she would be unable to repay the judgment debt if it was successful in the appeal. She contended that her entitlement to property and some monetary compensation is beyond dispute. All that the

applicant challenges is quantum. It has not been said that she is not entitled to any damages. Therefore it is entirely incorrect to state that she would be unable to repay the judgment sum.

Submissions

[34] In essence, Mr Anderson submitted that the chief consideration for the court in determining whether or not to grant a stay of execution is the interests of justice (see **Kingsley Thomas**). Bearing upon that consideration is the prospect of the applicant succeeding in the appeal as, if there is no prospect of success it would not be in the interests of justice to deprive the party of the fruits of the judgment. If there is some prospect, then the court should grant a stay. Further, the respondent's counter notice of appeal is an indication that the interests of justice would be best served by a stay since the respondent herself is dissatisfied with the order of the court.

[35] The likelihood of the respondent being able to repay the judgment sum if it is paid out to her and the applicant succeeds on appeal is another factor to which the court must have regard (see paragraph 10 of her affidavit dated 13 August 2010 where she stated that she had already committed it to debts that she owes). The judgment sum having been paid into court, there would therefore be no likelihood that the respondent would not be able to recover the fruits of the judgment if the

appeal was unsuccessful (see Blackstone's Civil Practice 2003 at paragraph 71.32; also **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ. 2065)

[36] The learned trial judge arrived at findings on matters for which no claim had been made and there was also a lack of evidence to support his decision on certain aspects of the case (see the grounds of appeal filed). There is authority to the effect that to decide on a case without evidence is to arrive at a perverse judgment (see **Lipkin Gorman v Karpnale Ltd and anor** [1989] 1 WLR 1340; **Larner v British Steel plc** [1993] 4 All ER 102).

[37] Finally, there is no requirement that the applicant must show that it will be ruined if the stay is not granted. The overall objective of the court is to look at the interests of justice.

[38] Mr Codlin's submissions on behalf of the respondent may be summarized thus:

a) The main criterion for the grant of a stay is that the applicant must show that without a stay he would be ruined. The interests of justice is some sort of judicial embellishment. The applicant here is a large multinational corporation and, quite wisely, no argument was advanced in that regard (see **Hammond Suddard Solicitors**). The judgment of Harrison, JA in **Thomas** is contrary to the modern

approach (see paragraph 9), as this court has in several judgments, upheld the modern principles that the justice of the case should be an important criterion and failure to show ruin must be fatal (see **Wilbert Walker v The Jamaica Public Service Company Ltd and Ors** (unreported) judgment of Anderson J delivered in the Supreme Court on 18 August 2004).

b) The old rule regarding the prospect of non repayment cannot apply in this case but, in any event, all the properties that, according to the trial judge's findings, belong to the respondent, are in the possession of the applicant so that there is no question of the applicant being unable to recover the judgment sum.

c) Further, there can be no application for a stay in this court where there is no appeal. Marsh, J. had given leave to appeal his refusal of the application but no appeal was filed therefore that would still be at large. If this court were to come to a different determination, the issue would be unresolved. There must be one process that must be extant at any particular time.

d) The applicant in its appeal is seeking nominal damages clearly showing that there was no challenge to the award of damages, only to quantum. In the alternative, the applicant seeks an order remitting the matter to the Supreme Court for an assessment of damages. There was nothing contending that the judge was

wrong in awarding damages and the authorities are clear that to successfully challenge the trial judge's findings, the applicant must show that he was clearly wrong.

e) In circumstances where the applicant admitted that the building was not in accordance with the contract and all that remains of the orders sought by the applicant is a reduction in damages or alternatively a retrial, there could be no reasonable prospect of the appeal succeeding. But, even if it were shown that there was some prospect of success, the applicant would still have to satisfy the court that it would be ruined without a stay.

f) Since the appeal is effectively against quantum and what is sought is simply a reduction of the amount, there is no possibility that the judgment debtor would get back more than a portion of the debt so there can be no justification for withholding all of the money. The court is accordingly urged to consider releasing a portion of the judgment sum. Mindful that the court would not be in a position to say how much of the debt would be recovered, a reasonable portion to withhold would be no more than a quarter or one third should the court reach the stage that it considers granting a stay.

The Issues

[39] I considered the issues for determination to be:

(i) What are the factors which must inform the exercise of the court's discretion in granting or refusing a stay of execution?

(ii) What course would satisfy the interests of justice in all the circumstances of the instant case?

The Factors

[40] It was common ground that up to the close of the nineteenth century the courts followed the principle enunciated in the case of **Atkins v Great Western Railway Co.** (1885-86) II Times Law Reports 400 that:

> "As a general rule, the only ground for such a stay was an affidavit showing that if the damages and costs were paid there was no reasonable probability of getting them back even if the appeal succeeded."

However, over time this "general rule" came to be regarded as harsh and often not easily established, so a less stringent approach was formulated and "the general rule" became the old rule. The modern or current rule, relied on by Mr Codlin, is that enunciated in **Linotype-Hell Finance Ltd. v Baker** [1992] 4 All ER 887, captured in the headnote as follows:

> "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." (Emphasis added)

Indeed, at page 888 (lines f to h) Staughton LJ in delivering the judgment of the court had this to say:

> "....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."

[41] I found it important to note that while the old rule referred to "the only ground" for a stay, the current practice refers to "a legitimate ground" and even as Staughton LJ spoke of putting the old cases aside and concentrating on the current practice, the old rule was not said to be

overruled or no longer applicable. Indeed, before **Linotype-Hell** the courts had recognized that there could be other bases for the grant of a stay. In the Times report of **Atkins** Lord Esher, Master of the Rolls who delivered the judgment with the concurrence of the Lord Justices on the panel, even while giving the general rule, had said that he would not undertake to say that the Court of Appeal would never listen to what happened at the trial in order to see whether it would grant a stay of execution and would not say that the court would not interfere "for some other reason".

[42] There is also merit in Mr Anderson's submission that the new civil procedure rules provide other bases upon which an applicant may seek to urge the court to grant a stay of execution. While **Linotype-Hell** has oft been cited in our courts as heralding the current approach and was approved and applied in **Flowers,** I have found no authority establishing that the ruin approach is to be followed to the exclusion of other legitimate grounds and I am entirely in agreement with the reasoning and conclusion of Harrison, JA in **Kingsley Thomas** that reliance may still be placed on the **Atkins** ground (see paragraphs 10 and 13 of the judgment). In coming to his conclusion his Lordship clearly also had in mind **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** (a case cited by the attorneys for both the applicant and the respondent in the instant case). In my opinion, that case, far from ruling out the

Atkins ground (which required the applicant to establish that there was no reasonable probability of repayment), enunciated a principle which included it as part of the court's consideration when looking at all the circumstances of the particular case before exercising its discretion to grant or refuse a stay. Financial ruin or inability to repay the judgment sum on a successful appeal, after enforcement, are but factors for consideration in seeking to determine where the justice of the particular case lies. It was therefore my view that Mr Codlin's submission that it is fatal to the applicant's application if it fails to show that it will be ruined if a stay is not granted, is flawed.

The Interests of Justice

[43] Far from being "a judicial embellishment", as Mr Codlin submitted, the interest of justice is an essential factor for the court's consideration in determining whether to grant or refuse a stay. Clarke, LJ (as he then was) at paragraph 22 of his judgment in **Hammond Suddard** had this to say:

> "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?"

[44] Coming as it did after the stringent **Linotype-Hell** test which requires that the applicant show that it **will** be ruined if the stay is not granted, this **Hammond Suddard** formulation requiring considerations of the risk of injustice to one or other or both parties, is the test that is now often relied on as the more appropriate consideration for the exercise of the court's discretion. I am in full agreement with that approach as it seems to me to be, in effect, a combination of the **Atkins** and the **Linotype** approach under the all-embracing rubric of the interests of justice. It would include, for instance, considerations of risk of ruin or of non-repayment or non-recovery of the judgment sum on the conclusion of the appeal or of the appeal being rendered nugatory. So that, in my humble view, Harrison JA was quite correct in his opinion that reliance may still be placed on the risk of the inability to repay and that failure to show ruin is not determinant of an application for stay. It is worthy of note that in refusing the application for a stay in **Hammond Suddard,** the court noted the absence of any suggestion that there was a risk that the respondent would not repay any sums if the judgment had in the meantime been enforced and the appeal succeeded and noted the apparent difficulty of recovering the judgment sum if the appellant did not succeed.

[45] But that is not the end of the matter. The interests of justice require another consideration namely, whether the applicant has some prospect of succeeding in the appeal. That consideration is directly linked to the interests of justice because, as Mr Anderson correctly submitted, if the appeal had no prospect of success, it would not be in the interests of justice to deprive the respondent of the fruits of the judgment.

[46] The applicant sought through its grounds of appeal to demonstrate that it had some prospect of success in its appeal (a course which had also been adopted by the applicant in **Kingsley Thomas**). On the other hand, Mr Codlin viewed those grounds from a different perspective, seeing them as an indication that the applicant's complaint was concerned only with the learned trial judge's assessment of damages with no contention that the judge was wrong in awarding damages, thus leaving the respondent's entitlement to damages unchallenged. This, he submitted, taken together with admissions of certain breaches by the applicant showed that the applicant really had no chance of succeeding on the appeal. However, the applicant's challenge was not confined to the learned trial judge's assessment of damages. There is also a challenge to findings of breach which the applicant contends were arrived at without any evidentiary foundation and which could render the judge's decision unsafe (see **Lipkin Gorman v Karpnale Ltd and anor**

Larner v British Steel plc. It is trite law that he who alleges must prove and what the applicant is contending in its grounds of appeal is a failure on the part of the respondent to prove aspects of her claim. The applicant also challenges the basis for the award of damages where no breach had been claimed. I therefore formed the view that the applicant had shown that it has some prospect of success on its appeal.

[47] On the question raised by Mr Codlin concerning the apportionment of the judgment sum, I did not think it prudent to venture into the realm of speculation which such an action would involve. The material before me did not include the judge's notes of the evidence before him and I had no indication as to whether or not there were any written reasons for his decision. Without these or at least written approval of counsel's notes of the evidence adduced or any material to guide me on the considerations which informed the learned trial judge's assessment, I was not in a position to accede to the urgings of Mr Codlin that because the applicant, through its witness at trial, seemed to have clearly accepted certain breaches and by implication accepted that the respondent was entitled to some compensation, the court should apportion the damages, withholding, at most, one third or a quarter of the sum and ordering the paying out of the remainder. Such apportionment was not appropriate in the circumstances of this case, particularly where the respondent herself

challenges the assessment and in her counter-notice of appeal seeks to set aside the judgment in its entirety.

Decision on the Application

[48] The first order sought in the amended notice of application for court orders was no longer before the court having been dealt with by a single judge's order prior to the commencement of this hearing and based on the above considerations, I determined the application in the manner set out below:

i. I accepted that the affidavit evidence before me supported the applicant's contention that there was a risk that the respondent would be unable to repay the judgment sum if the sums were paid out to her and the applicant was successful in its appeal (see paragraph 10 of the respondent's second affidavit and her evidence that she was not currently earning an income from her field of endeavour, which was subsistence farming) and that that was a legitimate ground for the exercise of the court's discretion in favour of the applicant.

ii. Furthermore, I accepted that there was no corresponding risk

that the respondent would not be able to enforce the judgment if the stay was granted and the applicant was unsuccessful in the appeal. I was of the opinion that there was a greater risk of injustice to the applicant if the stay was refused, as in all the circumstances of this case, there was a real risk that the appeal would be rendered nugatory.

iii Being of the view that the applicant had some prospect of success in its appeal, my conclusion was that I should exercise my discretion in favour of the grant of a stay of execution of the following orders, pending the determination of the appeal:

"1. General damages in the amount of $1,250,000.00 to the Claimant for Defendant's breach of contract in failing to provide a replacement house of equal total area.

2. General damages in the amount of $1,250,000.00 to the Claimant for Defendant's breach of contract in failing to provide appropriate acreage of land.

3. General damages of $500,000.00 to the Claimant for Defendant's breach of contract in failing to rebuild chicken coop.

4. Interest on the sums awarded as General Damages at 6% per annum from August 4, 2004 to 21st June 2006 and 3% per annum from 22nd June 2006 to the date of judgment."

[49] In addition, I ordered that the sum of $3,750,701.14 paid into court by the applicant and pursuant thereto, paid over to the Accountant General by the Resident Magistrate's bailiff for Kingston and St Andrew, be placed into an interest-bearing account in a reputable financial institution and held in the joint names of the attorneys-at-law for the parties until the appeal is determined or until further order of the court.

[50] Finally, I ordered that costs of this application be costs in the appeal.