[2013] JMCA App 5

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 22/2012

APPLICATION NO 34/12

BETWEEN	**SCOTIABANK JAMAICA TRUST AND MERCHANT BANK LIMITED**	**APPLICANT**
AND	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**1ST RESPONDENT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION INC**	**2ND RESPONDENT**

Dr Lloyd Barnett, Mrs Daniella Gentles-Silvera and Mrs Julie Thompson-James instructed by Livingston Alexander & Levy for the applicant

Charles Piper, Miss Marsha Locke and Wayne Piper instructed by Charles E Piper & Associates for the respondents

29 May, 3 July 2012 and 28 March 2013

IN CHAMBERS

MCINTOSH JA

[1] On 23 February 2012 the applicant filed notice and grounds of appeal against a decision of Anderson J delivered on 13 January 2012 by virtue of which the following orders were made:

"A. Judgment for the Claimants on the claim in the sum of US$14,867,992.98.

B. Interest on the judgment debt at the rate of 4% from July 10, 1997 to the date of payment.

C. Costs to the Claimants, to be taxed if not agreed."

The applicant also simultaneously filed an application seeking a stay of execution of the order pending the hearing of its appeal.

[2] That same day the application was considered by a single judge of this court who granted a temporary stay, adjourned the matter for further consideration on 20 March 2012 and extended the stay until then. Thereafter the matter was adjourned to 29 May 2012 on which date I heard arguments and reserved judgment to 29 June 2012. The temporary stay was again extended pending delivery of the decision which was rescheduled for 3 July 2012. On that date I gave a brief oral decision granting the application pending the hearing of the appeal or further order of the court. I promised then to reduce the decision into writing at a later date and I seek now to fulfill that promise.

The application

[3] The application was based on the grounds that:

(a) If the judgment sum is paid to the respondents there is no reasonable probability that it will be repaid should the appellant be successful on appeal.

(b) The appeal has a reasonable prospect of succeeding.

It was supported by an affidavit sworn to by Julie Thompson-James on 23 February 2012 in which she referred to the Notice and Grounds of Appeal filed by the applicant on even date, challenging the conclusions upon which the learned trial judge based his decision.

[4] This bid by the appellant to stay the execution of the learned trial judge's order was stoutly resisted by the respondents who seek to have the order affirmed as having been correctly reached. Accordingly, they filed a counter-notice of appeal on 8 March 2012 with supporting grounds additional to those relied on by the learned trial judge in arriving at his conclusions.

A summary of the background facts

[5] In providing the necessary background to the application I am content to rely on the summary in paragraph 4 of the applicant's written submissions which I set out below in its entirety:

> "4. The facts giving rise to the claim is that in 1997 the 1st Respondent lent money to Caldon Finance Group ("CFG") on the security of stock units in Jamaica Flour Mills, a publicly listed company. The stock units were owned by CFG's subsidiary and guarantor of the loan, PHJ Limited. A take-over bid was issued by ADM Milling Company to purchase the said stock units for US $14,861,992.98. The Appellant who was the Registrar and Transfer Agent for the shares, was given instructions by the shareholder, PHJ, to forward the proceeds of the sale to the 1st Respondent. By letter dated 27th May 1997 CFG wrote to the 1st Respondent requesting that it deliver the stock unit to the Appellant. By letter dated 28th May 1997 the 1st Respondent

> forwarded the stock units to the Appellant on the Appellant's "undertaking" to forward the amount of US$8,858,350.80 representing the sale proceeds of the stock units by signing and returning a copy of the letter. The Appellant signed the letter acknowledging receipt of the stock units.
>
> Further, stock units were sent to the Appellant by letter dated 30th May 1997 on the same basis. This letter ended by stating that if the sale did not materialize the certificates were to be returned to the 1st Respondent. The sale did materialize. Subsequent to the sale of the said stock units PHJ revoked its instructions to the Appellant and instructed that the bank draft representing the proceeds of sale of the stock units was to be delivered to its bearer. The bank draft was delivered to its bearer and was subsequently lodged in an account with the knowledge and consent of the 1st Respondent. The 1st Respondent wrote to the Bank of Nova Scotia Jamaica Limited requesting direct presentation of the said bank draft. The bank draft was cleared and the customer withdrew the funds on the same day. Part of the proceeds of sale was used by the 1st Respondent to discharge obligations due and owing by PHJ."

[6] The respondents then filed a claim seeking judgment in the sum of US$13,283 893.63 for breach of the undertaking which they contend was contained in the correspondence, passing between the applicant, the 1st respondent and CFG (referred to in the above summary) and for negligence of the applicant in delivering the sale proceeds for the shares to the 1st respondent's customer instead of to the 1st respondent directly which resulted in loss and damage to the 1st respondent.

[7] In its defence the applicant denied that there was any contract between itself and the respondents and asserted that it owed no duty of care to them. It denied that it had provided any undertaking to the respondents and contended that at all material

times, it was the agent of PHJ, authorized to act only on the instructions of its principal which is exactly what it had done.

The law

[8] In the ordinary way a successful claimant is entitled to the fruits of his judgment and there must be a good reason for depriving a claimant of his judgment (see **Winchester Cigarette Machinery Ltd v Payne and Another (No 2)** Times Law Reports, 15 December 1993). Therefore any applicant who seeks to obtain a stay of execution pending appeal has to show good ground for departing from that position.

[9] There have been a number of decisions issuing from this court which have set out the test to be applied in this jurisdiction in determining whether a stay of execution should be granted or refused and there is no issue joined between the parties in this regard. In recent times cases such as **Watersport Enterprises Ltd v Jamaica Grande Ltd & Others** SCCA No 110/2008 delivered 4 February 2009; **Reliant Enterprise Communications Ltd & Anor v Infochannel Ltd** SCCA No 99/2009 delivered 2 December 2009; **Cable and Wireless Jamaica Limited v Digicel Jamaica Ltd** SCCA No 148/09 Application No 169/09 delivered 16 December 2009 and **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Services Limited & Lowe** [2011] JMCA App 1, all approving **Combi (Singapore) Pte v Sriram and another** [1997] EWCA 2162, where it was held that the proper approach must be to make the order that best accords with the interest of justice. In making that determination their lordships gave the following guidance:

> "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."** (Emphasis added)

[10] In **Paymaster** Harris JA looked at the change in the approach of the courts to the requirements for a stay as was set out in **Linotype-Hell Finance Limited v Baker** [1992] 4 All ER 887 observing that now "the courts have adopted quite a liberal approach in that they seek to impose the interest of justice as an essential factor in ordering or refusing a stay." The learned judge of appeal referred to the case of **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065 where it was held that "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."

[11] It is quite clear therefore that a successful applicant for a stay must still satisfy a two-fold test in that the applicant must show that (i) there is some merit in the appeal and (ii) the granting of the stay is the order that is likely to produce less injustice between the parties (per Phillips JA in **Dalfel Weir v Beverley Tree** (**also known as Beverley Weir)** [2011] JMCA App 17)..

The contending arguments

[12] In seeking to show that the applicant had a meritorious appeal Dr Barnett referred to the notice of appeal it filed. It listed 32 grounds running the gamut of all the letters of the alphabet, doubling up on the second lap as the lettering started afresh. However, in his characteristic succinct style, Dr Barnett, helpfully gave an overview of the areas of the learned trial judge's findings with which the applicant took issue. Essentially, the gravamen of the applicant's complaints was the learned trial judge's finding that there was an enforceable agreement between the applicant and the 1st respondent; that there was a warranty that was enforceable in law and that there was a duty of care owed to the 2nd respondent's predecessor in title, by the applicant. Counsel submitted that the learned trial judge's finding that an agreement could be inferred from the signature on the copy letter returned by bearer was inconsistent with his finding that there was no agreement between the applicant and the 1st respondent as alleged.

[13] Further, counsel submitted, the applicant was indisputably an agent acting on the instructions of the owner of the shares with whom the 1st respondent had an agreement to apply the proceeds of the sale of the shares in discharge of its indebtedness to the 1st respondent. There was no indebtedness on the part of the applicant to the 1st respondent, counsel argued and it was not disputed that the applicant's function was that of registrar and transfer agent with responsibility to act only on the instructions of its principals. It was Dr Barnett's contention that an agreement made between its principals and a third party is not enforceable against the

agent and based on the general law even if the agent entered into an agreement on behalf of its principal and the status of the principal is known, the agent is not liable. Dr Barnett submitted that there was no agreement consisting of an intention as between the applicant and the 1st respondent to contract with each other and on their own behalf. Therefore, the essentials of the law of contract were not satisfied, counsel submitted and the 1st respondent's contention that there had been an offer and an acceptance had been rejected by the learned trial judge.

[14] Additionally, Dr Barnett submitted that a finding of the existence of a warranty based on the learned trial judge's acceptance of an undertaking by the appellant to forward the proceeds of sale to the 1st respondent was erroneous as to be enforceable in law a warranty has to be a particular term of the contract and cannot exist independently of it. Counsel maintained that there was no contract between the applicant and the respondents.

[15] It was his further contention that the judge's finding of a duty of care owed by the applicant to the 1st respondent was erroneous in the particular circumstances of this case where the applicant was acting as registrar and transfer agent and there was no evidence to support a proposition that as a matter of practice a registrar and transfer agent owes a duty to the owners of the shares when carrying out administrative duties as such. In sum, he submitted, on an examination of the judgment and the grounds of appeal it is clear that the applicant has a strong case and has passed the first threshold as laid down by the authorities from this court such as the recent cases of **Calvin**

Green v Wyn Lee Trading Ltd & Anor [2010] JMCA App 3 and **Wiliam Clarke v Gwenetta Clarke** [2012] JMCA App 2.

[16] The respondents' counter-notice of appeal was a further indication of the strength of the appellant's appeal and the shortcomings of the learned trial judge's decision, argued Dr Barnett, in that they seek to support his decision by advancing additional reasons. The first two contentions raised in the counter notice were rejected by the learned trial judge.

[17] Dr Barnett referred to the numerous affidavits that have been filed concerning the risk that the applicant maintains is inherent in the payment of the judgment sum to the respondent. This company to which the moneys would be paid, the 1st respondent having assigned the claim to it, is not a Jamaican company counsel argued. It is not resident here and can easily at any time transfer its assets or the proceeds of sale of any of its property over which it has a power of sale, outside of the island (see affidavits, of Mrs Thompson-James filed on 8 March 2012 and 12 March 2012). Dr Barnett submitted that with the backing of the Bank of Nova Scotia, one of the oldest banks in Jamaica for over 100 years with branches over the length and breadth of Jamaica, with undoubted financial stability there is no comparison between the applicant as part of the Scotia group and the 1st respondent and there is a real risk and an absence of assurance that if this amount is paid out to the 1st respondent it is more than it could realize from the sale of the assets they have declared. Another factor to be considered is that the 1st respondent could keep assigning debts to others which it has

done in many instances. Hence, Dr Barnett argued, a greater risk would be incurred in paying over the judgment debt to the respondents.

[18] Notwithstanding the strength of the Bank of Nova Scotia, it was Dr Barnett's further contention that the payment out of such a substantial sum as the judgment debt would have an adverse effect on its accounts, for instance, on its pension accounts and there could be no legitimate argument advanced that if the appeal did not succeed the applicant would not pay the judgment debt. Accordingly, counsel submitted the stay of execution should be granted.

[19] In his response, Mr Piper for the respondents, referred to the affidavit evidence which ran counter to the applicant's submissions of the likelihood of the 2nd respondent absconding if the judgment sum were paid out to them. He referred to the affidavit of Jason Rudd dated 17 May 2012 which spoke to a letter dated 19 March 2012 advising the applicant that the 2nd respondent is prepared to give an undertaking not to remove the proceeds from the jurisdiction. This issue, Mr Piper submitted, arose in **Combi**, one of the cases on which this court has relied in several of its decisions. The position in **Combi** is the position between the applicant and the 1st respondent in the instant case, Mr Piper submitted as the 1st respondent has indicated that it will give an undertaking not to remove the judgment sum from the jurisdiction and to secure that by putting the sum in a joint account in the joint names of the attorneys-at-law in the matter. Mr Piper submitted further that with that assurance the issue which is before the court as to whether the judgment sum would be dissipated or removed does not genuinely arise.

[20] Counsel noted that the applicant's submission about the adverse effects payment out would have on accounts such as its pension accounts was not supported by the evidence. Although this court has, in recent times, taken a more liberal approach in these applications, counsel argued that a defendant who says that he will face ruin must by evidence show that it would be harmed and no such evidence was forthcoming in this case. He referred to the judgment of Phillips JA in **Capital Solutions Limited v Terryon Walsh** [2010] JMCA App 2; the judgment of Harris JA in **Paymaster Jamaica Limited** with particular reference to the need of an applicant for a stay to show that it would be ruined if the stay were not granted. In the instant case there is no evidence that this applicant would be ruined by making the payment. Rather, the evidence is to the contrary, counsel submitted; as the applicant has indicated that it has the full backing of the Bank of Nova Scotia Jamaica Limited and there is no evidence that either the applicant or the Bank of Nova Scotia would be ruined if the applicant is made to pay out the sum.

[21] In his further submissions Mr Piper referred to cases such as **Watt or Thomas v Thomas** [1946] AC 484 for the principle that when a question of fact has been tried by a judge without a jury and it is not suggested that he has misdirected himself, an appellate court must attach the greatest weight to his findings he having had the opportunity to see and hear the witness and should not lightly disturb the trial judge's decision. He also relied on the judgment of Phillips JA in **James Jackson t/a Negril Tree House Resort v Curtis Arthurs** [2011] JMCA App 18, delivered on 19 August 2011 in which the learned judge of appeal outlined the basis for granting or refusing a

stay of execution, with particular reference to paragraph [19] where the question of the approach of the appellate court when dealing with findings of facts is discussed. It was Mr Piper's contention that the learned trial judge dealt with the material that was presented to him, heard from the witnesses, assessed all the evidence, accepting some and rejecting some, then arrived at his decision based on his findings of fact. In light of the authorities, counsel argued, those findings ought properly to be accepted unless it can be shown that there was no basis for them.

[22] A close examination of the decision of the learned trial judge reveals no arguable grounds of appeal, counsel contended and in that regard the court was asked to note that the grounds of appeal largely sought to challenge the trial judge' s findings of fact. Finally, in response to Dr Barnett's submission regarding the effort made by the respondent to bolster up the trial judge's decision Mr Piper argued that quite independently of whether or not there are arguable grounds for challenging the learned trial judge's decision it is within the right of the respondent to seek to support the decision on other grounds. Thus, the counter notice of appeal was intended to be in addition to the learned trial judge's findings. There is no merit in the appeal Mr Piper submitted and in light of the decision in **Combi** no reliance can properly be placed on the argument that there is a likelihood that the 1st respondent would abscond and be unable to restore the judgment sum to the respondents should they be unsuccessful in resisting the appeal. A stay of execution should therefore be refused.

[23] Dr Barnett took issue with the interpretation placed on the case of **Watt or Thomas v Thomas** relied on by the respondent for the approach to be taken by the appellate court to a trial judge's findings of fact and in his response submitted that those cases established that where a trial judge has made a finding of fact based on his assessment of the credit worthiness of witnesses whom he saw and heard, the appellate court should not disturb his findings unless they are plainly unsound. That does not apply counsel argued, where the findings do not depend on the credibility of witnesses. The findings of the learned trial judge in the instant case are set out in the grounds and none but perhaps two are based on the credibility of witnesses or upon any conflict between witnesses where the judge opted to follow one and not the other so that those cases relied on by the respondent do not assist in circumstances where the judge is making conclusions based on propositions not supported by the evidence. There are more importantly about 10 findings of law which are critical to this case so that those cases are not applicable in the instant case. The submissions relying on them are therefore unsound.

[24] The cases cited in regard to the second test are also not helpful to the respondent, Dr Barnett submitted. If the application were presented based on ruin and that is not established then the application will fail but in all the cases there is the alternative formulation which is illustrated for example in paragraph [24] of the judgment in **Paymaster**. That is a modern formulation and the one on which the applicant relies in the instant case, counsel submitted. The applicant has therefore satisfied both tests laid down in the authorities for the grant of a stay of execution and

the court is accordingly urged to grant the orders prayed in the applicant's notice of application.

The application of the tests to the case at bar

[25] After a careful review of the material before me I have come to the conclusion that this is an appropriate case for a stay to be granted. The successful party has a legitimate interest in ensuring that, should he be successful in resisting the appeal, he is able to enforce his judgment against the applicant as effectively as he could if the stay was not granted. There is absolutely no indication in the available evidence that the applicant will not be able to meet the judgment debt if its appeal is not successful. The applicant also has a legitimate interest in ensuring that it is not forced to realize assets to its manifest disadvantage while there is a real prospect that its appeal may succeed.

[26] In my opinion, the applicant has succeeded in establishing that it has a real chance of succeeding in its appeal. There are areas of law involved in the findings of the learned trial judge as to the existence of a contract between the applicant and the 1st respondent; as to the basis for his finding that a warranty existed; as to his finding that the correspondence exhibited gave rise to an undertaking. These are areas of substance and I agree with Dr Barnett that even where the challenges appear to involve findings of fact, for the most part they are not concerned with issues of the credibility of witnesses so that the proposition in the authorities such as **Watt v**

Thomas are not applicable to the instant case. The applicant has in my view satisfied the first test.

[27] It seems to me that in relation to the second test "there is a risk of harm to one party or another, whichever order is made" so that "the court has to balance the alternatives in order to decide which of them is less likely to produce injustice" (see **Combi)**. I am not persuaded by the argument that the 1st respondent would be unable to restore the judgment sum to the applicant should it succeed on appeal and in any event, applying the principles to be distilled from **Combi**, the stance taken by the 1st respondent in its willingness to enter into an undertaking not to remove the judgment sum from the jurisdiction and to place it in an interest bearing account in the joint names of counsel in the matter, renders that argument of no relevance. However, to the extent that the respondent is willing to take that position, it is certainly arguable that it is an indication that less hardship would be occasioned to it if the stay is granted because it is prepared to leave the funds in suspension so to speak with no evidence of any disruption in its business affairs that that may cause.

[28] On the other hand, the applicant's concern that notwithstanding the support it has from its main branch the payment out of a sum as large as the judgment debt would cause disruption in its affairs is not to be lightly regarded. In my opinion there is no merit in Mr Piper's argument that the seeming self assurance of the applicant in not making accommodation in the bank's accounts to satisfy the judgment debt should be counted against it resulting in an adverse inference being drawn in favour of the respondents and the rejection of the application. As was pointed out in the affidavit of

Mrs Thompson-James sworn to on 16 March 2012, although the claim is not referred to in its financial statements for the period ending 31 October 2010 the liability has been assumed by a subsidiary of Scotia Group Limited and no provision was made for it in the Consolidated Financial Statements of Scotia Group Jamaica Limited as based on legal opinion the applicant had a fair chance of success in the claim. The financial statement was published in October 2011 and the decision was handed down in January 2012 (see paragraphs 12 and 13). The strength of the applicant's chances of success on appeal is a factor to which I may also have regard in the balancing exercise which is my task and, my assessment of those chances gives the applicant the edge over the respondent's position. In other words, as I see it, more injustice is likely to be produced if the applicant is required to disrupt the operation of its accounts to satisfy the judgment debt in a scenario where its appeal has a good chance of succeeding. The second test is therefore also satisfied.

[29] In conclusion then, the applicant's application for a stay of execution of the judgment of Anderson J handed down on 13 January 2012 is granted, pending the determination of its appeal or further order of the court. Costs are to be in the appeal, as prayed.