JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 48 OF 2006

APPLICATION NOS: 72 & 80 OF 2006

BEFORE: THE HON. MRS. JUSTICE HAZEL HARRIS, J.A.

BETWEEN:	RAHUL SINGH	1st APPELLANT
AND	COMMONWEALTH COMMUNICATIONS LLC	2nd APPELLANT
AND	OCEAN PETROLEUM INC.	3rd PARTY INTERVENER/ 3RD APPELLANT
AND	KINGSTON TELECOM LTD.	1ST RESPONDENT/ CLAIMANT
AND	CABLE & WIRELESS JA. LTD.	4TH PARTY INTERVENER/ 2ND RESPONDENT

IN CHAMBERS

Winston Spaulding, Q.C., & Gregory Lopez instructed by Mrs. Jeanne Barnes for appellants.

Arthur Williams instructed by Harold Brady of Brady & Co. for 1st respondent.

Miss Hillary Phillips, Q.C., instructed by Grant, Stewart, Phillips & Co., for 4th party intervener/ 2nd respondent.

July 17, 18, 24 & December 5 , 2006

HARRIS, J.A:

Two applications have been placed before the court. The first is by the 1st and 2nd appellants, seeking a stay of execution of an order of Campbell, J refusing to set aside a default judgment pending the hearing of the appeal. The second is by the 1st respondent, which seeks an order for security of costs of the appeal as well as for the unpaid costs in the court below.

The 1st appellant is a shareholder and managing director of the 2nd appellant which is a company incorporated by him in Florida, in the United States of America. The 3rd party intervener/appellant is incorporated in the United States of America. The 1st appellant is also a shareholder of that company. The registered office of the 2nd appellant and that of the 3rd party intervener/3rd appellant is 8405 NW 29 Street, Miami, Florida.

The 1st respondent, a licensed telecommunications carrier, is a limited liability company incorporated under the laws of Jamaica. It owns and operates a telecommunication network in Jamaica. The 1st appellant is also a director of the 1st respondent company. The 4th party intervener/ 2nd respondent is a company duly incorporated under the laws of Jamaica. The 1st respondent entered into a contract with the 2nd respondent under which they leased circuits which were installed by the 4th party intervener/ 2nd respondent connecting their network to that of the 2nd respondent.

On December 15, 2003 a claim form and particulars of claim were filed by the 1st respondent against the 1st and 2nd appellants as well as one Zion Dahari, claiming a sum of U.S $1.8 million as an estimated amount due to them pursuant to a contract for the supply of telecommunication services. They also claimed damages for breach of contract for breach of fiduciary duties, alternatively, damages for conversion and or detinue. It was an averment of the 1st respondent that pursuant to the agreement with the 4th party intervener/ 2nd respondent, 20 circuits were leased. It was also averred that by an agreement among the shareholders, Dahari and one Marc Diamond assumed responsibility for provision of the equipment and finances to begin the network's operation.

It was further alleged by the 1st respondent that by a purportedly majority resolution of shareholders, Dahari was subsequently appointed managing director being authorized to execute documents on the 1st respondent's behalf, with unlimited power to contractually bind the 1st respondent. They also alleged that the 1st appellant conspired to cause the 1st respondent to enter a contract for the supply of telecommunication equipment by the 2nd appellant, by which it was agreed that the 1st appellant would make deductions for the equipment from the receipt of the revenues due to the 1st respondent, and that the appellants and Dahari, among other things, misappropriated all revenues received.

The 1st and 2nd appellants were served with the claim form and particulars of claim on December, 20, 2003. On January 9, 2004, they filed an acknowledgment of service. A defence was not filed.

On July 27, 2004 Rattray, J made a freezing order over funds in the National Commercial Bank, which were in the joint names of the 1st appellant and his brother Rohit Singh. The 3rd party intervener/3rd appellant sought to discharge the freezing order. In an affidavit dated October 26, 2004, in support of an application to discharge the order, one Richard Linhart, chairman and shareholder of the 3rd party intervener/3rd appellant averred that the money which forms the subject of the freezing order is not the property of either the 1st or 2nd appellant and that it was being held in trust for the 3rd party intervener/ 3rd appellant. On January 16, 2005 Norma McIntosh, J. refused the application. An appeal is pending with respect to the order of McIntosh, J.

On February 17, 2005, a Judgment in default of defence was entered against the 1st and 2nd appellants in the sum of U.S. $2,333,166.32 with interest at the rate of 12% from the date of Judgment, together with court fees and attorney's fees of $26,000.00. On April 13, 2005 the following applications came on for hearing before Campbell, J:

(a) An application by the 1st and 2nd appellants to set aside the default judgment, and for a stay of execution of any process

arising from the entry of the default judgment and stay of proceedings pending further order of the court. At the hearing two additional orders were sought, namely, to discharge the freezing order made and to strike out the claim.

(b) An application to intervene in the proceedings was made by the 4th party intervener/ 2nd respondent at the hearing, which was granted.

(c) An application by the 3rd party/intervener 3rd appellant for a stay of execution of the order of January 16 2006, pending their appeal and for an order that the freezing order had been determined by the default judgment.

The learned judge made the following orders:

Re the application by 1st and 2nd appellants:

> "(a) The application to set aside judgment in default entered on the 17th day of February 2005 is refused.
>
> (b) The application for Stay of Execution of any process arising from the Default Judgment is refused.
>
> (c) Application for a stay pending further order is refused.
>
> (d) Application for the discharge of freezing order and striking out of claim refused".

Re the application by the 4th party intervener/2nd respondent:

> "(1) Cable and Wireless be joined as a 4th party/intervener to this suit.

(2) That the defendants, heir, servants and/or agents be restrained from dealing with any assets whether located within the jurisdiction or not."

Re the application by 3rd party intervener/3rd appellant:

"(1) That the application for Stay of Execution of any process to execute any judgment of the Court which could access the money is refused.

(2) That the Order of the Court of the 27th July, 2004, freezing the sum of $630,000.00 in the account of Rahul Singh and Rohit Singh, "until trial" has been determined by the default judgment."

The Notice of Application for the stay is couched in the following terms:

"1. That there be a Stay of Execution pending the decision of the Court of Appeal in the Appeal therein.

2. That there be such relief in the extending or the abridging of time to do any act or to make an application to the Court in this application, as the Court may deem necessary and appropriate in the circumstances.

3. That there be such further Order or relief, substantively or procedurally, which the Court considers just and appropriate in the circumstances of this case.

4. That to the extent a Judge of the Court considers it necessary or appropriate, an interim ex-parte application be granted to extend or effect a Stay of Execution pending inter-partes hearing of the application herein."

The grounds on which the 1st and 2nd the appellants rely in support of the application are as follows:

"(1) That the appellants have strong Grounds of Appeal on the merits on the issues before the Court which are

patent on the face of the record and which significantly exceed the test enunciated by the Honourable Court of Appeal of "**some prospect of success**" and the outcome of the Appeal ought not to be negated by any acts of execution.

(2) That if a continued stay is not granted the Defendants would be ruined and suffer extreme hardship.

(3) That from the evidence before the Court and the evidence on the record of the Court, the Claimant company is a closed defunct company operating without assets which would make recovery of any money from it impractical, unlikely or impossible.

(4) That the issues on this Appeal include matters of procedural, judicial and general public importance going far beyond the implication to the parties themselves and therefore reinforce the requirement of a Stay of Execution pending determination of these matters of great significance. These include:

The abuse of the Court's process and deceit in the face of the Court which ought to be pronounced upon by the Court without the Court's determination being negated by the Claimant's securing benefits to which there is every indication that it has no entitlement at all and in an amount not claimed by the Claimant/Respondent as a matter of fact.

(5) That on the facts and issues before the Court there is a very serious risk of injustice if a stay of execution is not in place pending Appeal.

(6) That on a balance of convenience, more harm and undesirable consequences could arise from not having a stay of execution than from having the stay of execution.

(7) That having regard to the overall nature of the issues, the Court of Appeal itself has a very special interest in ensuring that no developments will take place which will defeat the Court's duty to prevent any abuse of

the process of the Courts in exercise of its powers and inherent jurisdiction or lead to any injustice.

(8) **The irregularities and procedural anomalies in this matter, including the Order granting the 4th Party Intervener status to Cable and Wireless as well as the issue of the undisputed entitlement of Rohit Singh to the funds held in the names of Rahul Singh and Rohit Singh the latter not being a party in this matter, support the arguments for a necessary Stay of Execution pending the determination of the appeal herein, to facilitate a clarification of the complex issues involved which would affect the very manner in which the execution of any order could be implemented in this context".**

Before embarking on the applications it is of importance to state that in paragraph 8 of the foregoing grounds it is suggested that the order of Campbell, J. made in favour of the 4th party intervener/ 2nd respondent, is being challenged on appeal. The appeal is against the order refusing to set aside the default judgment. There is no appeal against the order made with respect to the 4th party intervener/2nd respondent. The learned judge ordered, among other things, an injunction restraining the 1st and 2nd appellants from dealing with their assets with respect to the 4th party intervener/2nd respondent's application. There can be no order for a stay of execution against the 4th party intervener/2nd respondent.

An appeal does not operate as a stay of execution of the judgment of the court below unless the court below or the Court of Appeal so orders. Rule 2.11.

1 (b) of the Court of Appeal Rules 2002 permits this court to order a stay of execution of a judgment or an order pending appeal. The rule states:

> "2.11 (1) A single judge may make orders -
>
> (a) for the giving of security for any costs occasioned by an appeal;
> (b) for a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal".

A court, in considering the question of a grant of a stay of execution, ought to be guided by the principles pronounced by Staughton, L. J. in the case of ***Linotype-Hell Finance Ltd. v Baker*** [1992] 4 ALL E.R. 887. The test as propounded by Staughton L.J. was couched in the following terms when, at page 888, he said:

> "It seems to me that if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution. The passage quoted in the Supreme Court Practice from ***Atkins v Great Western Rly Co*** (1886) 2 TLR 400. 'As a general rule the only ground for a stay of execution is an affidavit, showing that if the damages and costs were paid there is no reasonable probability of getting them back if the appeal succeeds, seems to be far too stringent a test today'."

The foregoing principles were cited with approval and followed by this court in the case of ***Flowers Foliage and Plants of Jamaica and Others v***

Jamaica Citizens Bank (1997) 34 J L R page 447. At page 453 Rattray, P. stated:

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

Although Staughton L.J. enunciated that the appeal should be one in which there is some chance of success the prospect of the successful pursuit of the appeal being one of the predominant factors in the determination of a stay, an appellant must show that his chance of success at the hearing is real. I must pause here to state that under Rule 1. 8 (a) of the Court of Appeal Rules 2002, permission to pursue an appeal will only be granted in circumstances where there is a real chance of success of the appeal. Notwithstanding that this application before me is one for a stay of execution, it would be apt to consider whether there is a real chance of success of the appeal as stipulated by rule 1.8 (a) as opposed to some chance of success.

The court has an unfettered discretion in the exercise of its jurisdiction in granting a stay of execution of a judgment. Over the years the approach of the court is to commence with the assumption that a claimant is entitled to the fruits of his labour and ought not to be deprived thereof unless there is some good reason for doing so. See ***Winchester Cigarette Machinery Ltd v Payne and Another*** (No) 2 (1993) T.L.R. 647.

An appellant, therefore, in seeking a stay of execution, must satisfy the court not only that his appeal has a real chance of success but also that without the stay he would be ruined. The court , in its discretion in granting or refusing a stay, ought to be concerned with the question of the risk of injustice to either party or both, giving special consideration to the question as to whether the appeal would be stifled if the stay is refused. In ***Hammond Suddard Solicitors v Agrichem International Holdings*** 2002 CP Rep 21, C.A. Clarke, L. J. at paragraph 22 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 as 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?"

Mr. Spaulding, Q.C., argued that entry of the default judgment was irregular and having not been regularly entered, ought to have been set aside. He further contended that the claim as framed was for an unspecified and not a specified sum. The claim, he submitted, is for unliquidated damages and should be the subject of an assessment of damages.

It was submitted by Mr. Williams that a court may only set aside a judgment in default if it was wrongly entered or irregularly obtained and that the default judgment in this case had been regularly obtained. He further argued that the 1st and 2nd appellants failed to show that they had a good reason for their failure to file a defence.

The learned judge, at page 9 of his judgment, in holding that judgment in default had been correctly entered said:

> "All of the conditions referred to in 13.2 (1) (b), having been satisfactorily complied with, the defendant is therefore not entitled to have the default judgment set aside on the basis that it was wrongly or irregularly entered".

At page 13 he went on to say:

> "There was no good explanation for the delay of fourteen months and I so rule. Having so found, there is no need to consider whether the defendants had a real prospect of successfully defending the claim. The application by the 2nd and 3rd defendants to set aside the default judgment therefore fails".

The judgment in default of defence was entered in the following terms:

> "The 2nd and 3rd DEFENDANTS, RAHUL SINGH, and COMMUNICATIONS LLC having entered an Appearance but filed no Defence to the action herein. IT IS THIS DAY ADJUDGED that the Plaintiff recovers from the 2nd and 3rd Defendants the sum of US$2,033,161.32 together with interest thereon at the rate of 12% from the date of Judgment plus Court fees and Attorneys fixed costs on issues in the amount of J$25,000.00".

For the purpose of this application it will only be necessary to recite the contents of the claim as endorsed on the claim form. It is outlined as follows:

> "The Claimant, ***KINGSTON TELECOM LTD*** of 131 Harbour Street, in the parish of Kingston claims against the Defendants, ***Zion Dahari*** of ***3914 Island Estate Drive, Miami, Florida 33160;*** and ***Rahul Singh and Commonwealth Communications LLC, both of 8405 NW 29 Street, Miami FL 33122*** the sum of US$1.8M, being the estimated amount due and owing to the Claimant pursuant to a contract for the supply of telecommunications services by the Applicant to the Defendants, and damages arising from the 1st Defendant's breach of fiduciary duties, and the 2nd Respondent's breach of a contract for the supply of equipment under which the Defendants conspired to, and did wrongfully remove the Claimant's equipment from its premises despite having withheld monies received for and on behalf of the Claimant as consideration for the supply of the said equipment.

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Amount claimed	US$1,800,000.00
Court Fees	2,000.00
Attorney's Fixed Costs on issue	10,000.00
Total amount claimed	**US$1,800,000.00 and JA $12,000.00"**

The particulars of claim itemize the claim for U.S.1.8 million dollars as one for the operation of the network for 4 months less the provision of the purchase price of the equipment by the 2nd appellant.

The claim upon which judgment was entered was treated as a specified or liquidated sum. Rule 2.4 of the Civil Procedure Rules (CPR) defines a claim for a specified sum. The rule states:

> ". . . claim for a specified sum of money" means-

> (a) a claim for a sum of money which is ascertained or capable of being ascertained as a matter of arithmetic and is recoverable under contract; and . . ."

A specified sum of money within the context of a claim must be classified as a liquidated demand. The true nature of a liquidated demand was described by the learned authors of Halsburys Law 4th Edition Volume 37 at para 397 as follows:

> " A liquidated demand is a debt or other specific sum due and payable by the defendant to the plaintiff. It must be ascertained or capable of being ascertained as a mere matter of arithmetic. It does not extend to unliquidated damages, whether in contract or tort, and such a claim does not become liquidated merely because it is expressed as a definite or specific figure. On the other hand, liquidated damages stipulated as a genuine pre-estimate of the damages which would probably arise in respect of a breach of contract constitute a liquidated demand. So does a claim based on a quantum meruit, such as reasonable remuneration for services rendered or a claim for bank, defendant charges".

The issue as to whether the claim for which judgment had been entered ranks as a specified or an unspecified sum is critical to the determination of the appeal. A claim for a specified sum does not necessarily rank as a specified amount merely because a sum has been stated as due and owing to a claimant. To place liability on a defendant, such sum must not only be ascertainable or capable of being ascertained arithmetically but it must be plain that it is obviously intended that the sum is the amount for which a defendant may become liable and it is in fact, due and owing.

Rule 12.5 of the CPR deals with the entry of default judgments. It provides:

> "The registry must enter judgment at the request of the claimant against a defendant for failure to defend if -
> (a the claimant proves service of the claim form and particulars of claim on that defendant; or
> (b) an acknowledgement of service has been filed by the defendant against whom judgment is sought; and
> (c) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;
> (d) that defendant has not -
> (i) filed a defence to the claim or any part of it (or such defence has been struck out or is deemed to have been struck out under rule 22.2(6));
> (ii) where the only claim is for a specified sum of money, filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or
> (iii) satisfied the claim on which the claimant seeks judgment . . ."

Rule 12.10 of the CPR outlines nature of a default judgment. The rule provides as follows:

> " Default Judgment –
> (a) on a claim for a specified sum of money, shall be judgment for payment of that amount or, where part has been paid, the amount certified by the claimant as outstanding-
> (i) (where the defendant has applied for time to pay under Part 14) at the time and rate ordered by the court; or
> (ii) (in all other cases) at the time and rate specified in the request for judgment

(b) on a claim for an unspecified sum of money, shall be judgment for the payment of an amount to be decided by the court".

Rule 16.2 outlines the procedure leading to assessment of damages consequent on the entry of default judgment under Rule 12.10 (1) (b).

Under Rule 12.11 any interest claimed must be included in the claim form. The rule states:

"12.11 (1) A default judgment shall include judgment for interest for the period claimed where -
(a) the claim form includes a claim for interest;
(b) the claim form or particulars of claim includes the details required by rule 8.7(3); and
(c) the request for default judgment states the amount of interest to the date it was filed.

(2) Where the claim includes any other claim for interest, the default judgment shall include judgment for an amount of interest to be decided by the court, or at the statutory rate."

Rule 8.7 (3) makes it a mandatory requirement for a claimant who is claiming interest to so specify. The rule reads:

"8.7 (3) A claimant who is seeking interest must -
(a) say so in the claim form, and
(b) include in the claim form or particulars of claim details of -

(i) the basis of entitlement;
(ii) the rate;
(iii) the date from which it is claimed;
(iv) the date to which it is claimed; and

(v) where the claim is for a specified sum of money,
- the total amount of interest claimed to the date of the claim; and
- the daily rate at which interest will accrue after the date of the claim".

It is clear that interest may only be awarded where it has been expressly pleaded.

The setting aside of a default judgment is governed by Rules 13. 2 (1) and 13. 3 (1). Rule 13. 2.(1) provides:

"13.2 (1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because –
(a) in the case of a failure to file an acknowledgment of service, any of the conditions in rule 12.4 was not satisfied;
(b) in the case of judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied; or
(c) the whole of the claim was satisfied before judgment was entered".

Under this rule, the court is bound to set aside a Judgment in default which had been entered, either for want of acknowledgment of service, or, in default of defence by reason of a claimant's failure to comply with the conditions as prescribed by rule 12.5, or, in circumstances where the claim in its entirety had been satisfied before the entry of judgment. In the present case, the 1st respondent was not in breach of any of the conditions laid down by rule 13. 2. (1) which would warrant the judgment being set aside under this rule.

It follows therefore that there would have been no irregularity in the entry of the judgment under the rule.

I now turn to rule 13.3. It states:

> "13.3 (1) Where rule 13.2 does not apply the court may set aside a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.
>
> 13.3 (2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:
>
> (a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered;
> (b) given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be."

The judgment must be treated as regularly entered. The first question which arises is whether the 1st and 2nd appellants had made the application to set aside the judgment as soon as reasonably practicable after discovering that it had been entered. Judgment was entered on February 17, 2005. The 1st appellant acknowledged receipt of notification of its entry by way of a telephone call from Mr. Spaulding, Q.C., on the very date of the Judgment. On March 7, 2005, nineteen days later, the application to set it aside was made. This period in my view, within which the application to set aside the judgment was made was a reasonable time after which the judgment came to the 1st appellant's attention. He has therefore satisfied the criterion demanded by rule 13.3 (2) (a).

Fourteen months elapsed prior to the entry of judgment during which time neither the 1st nor 2nd appellants filed a defence within the prescribed time, nor did they seek an extension of time within which to do so. However, the 1st appellant asserted that failure to file defence was due to the fact that up to the date of judgment arbitral proceedings relating to the issues before the court were being conducted in Miami and negotiations between the 1st respondent and themselves, with a view to brokering a settlement of the claim, were in progress. The arbitral proceedings would not operate as a bar to the entry of judgment. However, an affidavit of George Blunstein, an attorney at law in Miami, Florida, representing the 1st and 2nd appellants, discloses that on February 9, 2005 a draft settlement agreement was submitted to him by Frank Wolland, the 1st respondent's attorney at law. He Blunstein, suggested amendments to the agreement by inserting marginal notes on the draft and returned it to Wolland. On February 15, 2005, Wolland issued a notice to the shareholders of the 1st respondent for a meeting to be convened on March 8, 2005 in order to finalize the agreement. On February 17, 2005 Wolland returned the settlement agreement suggesting additional modifications to the agreement.

It cannot be disputed 1st and 2nd appellants ought to have adhered to the rules and should have filed a defence within the prescribed time. It is clear however, that serious negotiations were being conducted with a view to a settlement as a consequence of which the draft agreement had been prepared. I am of the view that a distinct possibility existed that a final agreement would

have materialized but this had been thwarted by the entry of the default judgment as the judgment was entered on the very day that Wolland had not only transmitted the agreement to Blunstein suggesting further amendments thereto, but had also summoned the shareholders of the 1st respondent to a meeting which should have taken place in March, 2005. This, to my mind, provides a plausible excuse for the failure to file a defence.

The critical issue is whether 1st and 2nd appellants have a real chance of succeeding in their appeal. Is the judgment as entered capable of having validity so as to be enforceable against them? The claim as stated, relates to an estimated sum of US$1.8 million. Neither the claim form nor the particulars of claim specifies mathematically the manner in which the US$1.8 million was computed. The 1st appellant contends that the company did not make a profit and that only 5 TI circuits were in operation and not 20 TI circuits as claimed by the 1st respondent. This clearly could affect funds realized from the venture under the contact between the parties.

Although a money figure is attached to the claim for the network operation such claim is particularized as an estimated sum received by the 1st and 2nd appellants as gross revenue. In my opinion, the sum of U.S.$1.8 million claimed contemplates the assessment of any funds which was likely to have generated from the operation of the telecommunication network less the purchase price of the equipment provided by the 2nd appellant. This purchase

price had not been stated. It is obvious that any amount due on the claim for which judgment had been entered is yet to be determined.

Further, the award of interest clearly offends rules 8.7 (3) and 12 .11(1) of the Civil Procedure Rules. The rules make provision for the payment of interest in a default judgment only in circumstances where the claim form includes a claim for interest, the details of which are set out in the claim form and particulars of claim and the request for default judgment states the amount of interest. The claim form as well as the particulars of claim are silent as to a claim for interest. Interest can only be awarded where it has been expressly pleaded. No details relating to interest as required by the rules had been stated yet the judgment was entered with interest on the claim at the rate of 12%.

A further question to be addressed is whether the 1st and 2nd appellants or any of them would be ruined if a stay is refused. In paragraph 7 in an affidavit sworn on May 22, 2006 the 1st appellant states:

> "Not having access to the money has ruined me personally, financially, physically, and emotionally. Since Ocean Petroleum USA, Inc. had borrowed the money from Bank United to loan it to me with its office building as collateral, when this money became frozen, I had to make payments to the Bank on behalf of Ocean Petroleum until I ran out of money and had to lay off every one of my employees, resulting in Ocean petroleum having to sell its building to pay off the loan. This resulted in a complete shut down of its own business as well as my business, including Commonwealth Communications. Thus I stopped having any income, and to make

> matters worse, the stress of the situation caused me to wake up one day in November of 2004, completely deaf, resulting in no possibility of me ever being able to find another job to earn a living. I have thus had to sell my car, my home, and all my personal assets just to survive".

The foregoing averment of the 1st appellant shows that due to the unavailibity of funds both himself and the 2nd appellant would be ruined should the stay be refused. He speaks to his impecuiousity and to the 2nd appellant being no longer in operation. These factors point to the presumption that he could be ruined if the appeal is not heard.

The prospect of success of the appeal being good, the 1st and 2nd appellants ought to be permitted to pursue the appeal. To deny them the right to be heard on appeal could cause them irreparable harm as the refusal of a stay could stifle a good appeal. No injustice would be encountered by the 1st respondent if the appeal proceeds. Accordingly, there ought to be a stay of the execution of the order made refusing to set aside the judgment in default as against the 1st and 2nd appellants. It is of manifest importance to emphasize that, as earlier indicated, the order for a stay does not extend to the 2nd respondent.

I now turn to the application for security for costs. Rule 2.12 of the Court of Appeal Rules 2002 empowers the court to order an appellant to provide security for costs. The rule states:

"The court may order -

(a) an appellant; or
(b) a respondent who files a counter- notice asking the court to vary or set aside an order of a lower court,

to give security for the costs of the appeal.

(2) No application for security may be made unless the applicant has made a prior written request for such security.

(3) In deciding whether to order a party to give security for the costs of the appeal, the court must consider –

(a) the likely ability of that party to pay the costs of appeal if ordered to do so; and
(b) whether in all the circumstances it is just to make the order.

(4) On making an order for security for costs the court must order that the appeal be dismissed with costs if the security is not provided in the amount, in the manner and by the time ordered".

Mr. Spaulding, Q.C., submitted that there is money frozen in the National Commercial Bank account which the 1st Respondent could access, and as a consequence there could be no basis for an order for security for costs. He contended that there has been no request for the costs of the appeal as required by the Court of Appeal Rules and there has been no agreement for the costs or taxation thereof.

Funds amounting to $638,696.24 in the National Commercial Bank which are subject to a freezing order of Rattray J. are in the names of the 1st appellant and his brother Rohit Singh, but have been claimed by the 3rd

appellant as having a proprietary right to it. An application to discharge the freezing order was refused and an appeal against the refusal of that application is pending. Clearly, the ownership of the funds is in dispute and obviously the money would not be accessible to the 1st respondent by way of an order for attachment or garnishee against the 1st appellant.

A letter dated June 22, 2006 addressed to the appellant's attorney at law Mrs. Jean Barnes from the 1st respondent's attorneys-at-law shows that there had been in fact a request for the costs of the appeal. The estimated costs of the appeal were placed at $1,500,000.00. This letter remains unanswered. So far as taxation of the costs in the court below is concerned, a Bill of Costs for the sum of $5,504,362.80 was served on the 1st and 2nd appellant's attorney at law on June 22, 2006. It would therefore be incorrect to assert that a request for the costs had not been made. No Notice of Service of Points of Dispute was filed by these appellants in keeping with rule 65. 20.(1) of the C P R. It must be noted however that a default costs certificate was never issued in compliance with rule 65.21 nor has the bill been taxed.

Foreign residence has always been a condition precedent for ordering security for costs. Once that condition is satisfied it is open to the court to consider matters not only with respect to the residence out of the jurisdiction but also to matters inherent to a plaintiff including impecuniousity. See ***Thine v London Properties Ltd*** [1990] 1 WLR 562. As a general rule, the fact that a

party instituting proceedings is resident out of the jurisdiction and had no assets within the jurisdiction, is a ground for an order for security of costs. Under the old principles once foreign residence was established, impecuniousity was one of the principal factors for ordering security for costs. However, impecuniousity so severe that an order for security would stifle a genuine appeal provided a basis for resisting an order. I can envisage no reason why the court, in its application for its discretion under the new rules would depart from these principles.

It was contended by the 1st and 2nd appellants that if an order for security for costs is made, their appeal would be stifled and that their inability to meet the costs was principally due to impecuniousity. The question as to whether an order for security for costs would preclude an appellant from pursuing his appeal and whether, in the future, an appellant would be in a position meet the costs occasioned by the appeal should the appeal be determined in the respondent's favour, are separate and distinct. Judicial authorities have shown that a burden is imposed on an appellant to satisfy the court that ordering security for costs would operate as a bar from pursuing the appeal. In speaking to his means, he must show, not merely, that he does not have the funds but that he is unable to raise it. It is not enough for him to assert that he is without the means to pay the costs. He must adduce evidence to the satisfaction of the court that he is unable to secure finances to meet the costs.

In ***Yorke Motors v Edwards*** [1982] 1 WLR 444 at 449 Lord Diplock in quoting said:

> "The fact that the man has no capital of his own does not mean that he cannot raise any capital; he may have friends, he may have business associates, he may have relatives all of whom can help him in his hour of need".

In ***Keary Development v Tarmac Construction Ltd*** [1995] 3 All ER 534 at page 540, Peter Gibson L.J said:

> "However, the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As all this is likely to be peculiarly within the knowledge of the plaintiff company, it for the plaintiff company to satisfy the court that it would be prevented by an order of security from continuing the litigation . . ."

It is taken that the appellants have a good appeal. The funds in National Commercial Bank is purportedly owned by the 3rd intervener/ 3rd appellant. I will therefore proceed on the premise that the 1st appellant has no assets in the jurisdiction. There is no doubt that the 2nd appellant has no assets in Jamaica. The 1st appellant is the managing director of the 2nd appellant, a corporation, although the 1st appellant asserted that the 2nd appellant is no longer in operation, he has not placed before that court any evidence confirming this or whether the 2nd appellant has assets outside the jurisdiction of this court. It is reasonable to assume that there are shareholders, directors of the appellant company and others who could give support by way of financial assistance for

the conduct of the litigation. There might possibly be persons who could render financial assistance to the 1st and 2nd appellants. It is indubitably obligatory on their part to advance evidence of the possible support from other sources. It behoves them to place before the court a full account of all facts relevant to their financial standing so that the court can decide what are the true facts. The financial status of the 1st appellant as revealed by his affidavits paint a gloomy picture of his means. Although he declared that he is impecunious his affidavits do not disclose evidence to show that he cannot obtain assistance in continuing the litigation and this he ought to have done.

The 1st and 2nd appellant are resident out of the jurisdiction The justification for the exercise of a discretion with respect to individuals ordinarily resident out of the jurisdiction raises the issue of enforceability in the event that the non resident is unsuccessful in his appeal. There are likely to be difficulties in enforcing a judgment made in this jurisdiction against a non resident individual or company as opposed to the enforcement of a judgment against a party who is resident within the jurisdiction. In light of the presumptive difficulties in enforcement, a court may as a matter of course order security for costs against a party who is resident outside is jurisdiction.

In ***Kohn v Rinson & Stafford (Bros) Ltd.***, [1947] 2 All ER 839 at page 840 Lord Denning said:

". . . and as Brandon LJ pointed out:

> It is plain that it is in the discretion of the court to order security for costs, and it does so as a matter of course when a plaintiff is out of the jurisdiction. The reason being that, if a judgment was obtained by the defendant against the plaintiff for costs such an order cannot be enforced by direct process of these courts."

Although there is no evidence expressly intimating that if successful the respondents would encounter difficulty in enforcing a judgment and costs against 1st and 2nd appellants, they are resident outside the jurisdiction of this court being resident in Florida, in the United States of America. There is no doubt that a Floridian court would recognize a judgment of this court. However, if successful on appeal, it is obvious that a significant burden would be placed on the 1st respondent in securing enforcement. Although the default judgment has been recorded in a court in Broward County, Florida, the 1st respondent would have to institute proceedings with respect to the judgment and costs against the 1st and 2nd appellants and clearly would, initially, be required to meet all costs attendant thereto. Thereafter, they would have to take steps towards execution. This would involve additional costs. Not only will the 1st respondent be burdened with all these costs which they may eventually recover, but they will presumably encounter some delay in the recovery. It is also reasonable to surmise that by the time steps are taken to execute judgment and costs the appellants could dissipate any assets which they might possess rendering any

attempt at recovery of the proceeds of the judgment and costs an exercise in futility.

There ought to be a safeguard against the 1st respondent being exposed to the risk of not recovering the fruits of a judgment and costs, if successful on appeal. The 1st and 2nd appellant's lack of means is primarily the risk against which the 1st respondent is entitled to be protected in that they might not be in possession of assets to meet the costs should they be unsuccessful in the appeal.

I consider that this appeal is one in which an order for security for costs is justifiable by virtue of the 1st and 2nd appellants residence in the United States. Any steps taken towards enforcement of a judgment and costs against any assets they are likely to own in the United States would be subject to extra burden on the 1st respondent in terms of costs and possible delay. Having regard to all the circumstances, it is just to make an order for Security for Costs, both for costs of the proceedings below and for this appeal. In my judgment, a fair assessment of the costs of the court below would be $3,330,000.00 and the estimated costs of the appeal would be $1,000,000.00.

It is ordered that:

(1) there be a stay of execution of the judgment in default against the 1st and 2nd appellants pending the hearing of the appeal. This order for stay does not extend to the 4th party intervener/2nd respondent.

(2) 1st and 2nd appellants are to pay into court the sum of $4, 330,000.00 as security of costs of the appeal or enter into a bond for the said amount with two sureties resident in Jamaica within twenty one days of the date hereof, failing which the appeal shall stand dismissed with costs to be agreed or taxed if security is not provided in the amount specified within the time prescribed.