

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS 47/2016 & 53/2017

MOTION NO COA2020MT00017

**BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA**

BETWEEN	TRAILLE CARIBBEAN LIMITED	APPLICANT
AND	CABLE & WIRELESS JAMAICA LIMITED T/A LIME	RESPONDENT

Dr Lloyd Barnett and Oshane Vacciana instructed by Hart Muirhead Fatta for the applicant

Mrs Denise Kitson QC, Kevin Williams and David Ellis instructed by Grant, Stewart, Phillips & Co for the respondent

21 September and 9 October 2020

BROOKS JA

[1] After a trial and an assessment of damages, both conducted in the Supreme Court, the applicant, Traille Caribbean Limited (Traille), was ordered to pay the respondent, Cable & Wireless Jamaica Limited t/a LIME (CWJ), the following:

- “(i). \$1,415,075.19 being the shortfall of [Traille’s] payments to the Government of Jamaica which is irrecoverable by [CWJ] as a set-off[;]
- (ii). Interest on \$65,986,564.57 in the sum of \$20,556,493.00;

- (iii). Per diem interest at \$28,596.00 from 1st May 2017 to 22nd May 2017 in the sum of \$629,112.00[.]”

[2] Traille appealed to this court from both decisions, but its consolidated appeal was unsuccessful. This court dismissed the appeals and ruled, on 31 July 2020, that:

- “1. The appeal from the decision of Batts J [made at the trial] is dismissed and the judgment is affirmed.
2. The appeal from the decision of Laing J [made on the assessment of damages] is dismissed and the judgment is affirmed.
3. Costs of the consolidated appeals to the respondent to be agreed or taxed.”

(See **Traille Caribbean Ltd v Cable and Wireless Ja Ltd T/A Lime** [2020] JMCA Civ 35)

[3] Traille, by this application, has indicated its wish to further appeal to Her Majesty in Council. The application is not only for conditional leave to pursue that appeal but also for a stay of execution of the judgments of the Supreme Court, pending the outcome of the appeal. CWJ, quite properly, has not sought to oppose the application for leave to appeal, since it is as of right, but contends that the application for the stay should be refused.

[4] The appeal to Her Majesty in Council is as of right because it arises from a final decision in a civil case, which directly involves a claim for monies in excess of \$1,000.00 (see section 110(1)(a) of the Constitution). The application was made within the stipulated time and, therefore, is properly before the court.

[5] The issue in dispute is whether execution of the judgment should be stayed until the resolution of the appeal before the Privy Council.

The application for stay of execution

[6] The essence of Traille's application for the stay of execution is that it cannot afford to pay the judgment debt to CWJ, and if CWJ is allowed to enforce the judgment Traille would be ruined. The execution, it contends, would force it out of business, it would be unable to pursue its appeal and even if it were able to pursue an appeal, its expected success would be nugatory. In support of those assertions, its Managing Director, Mr Rory Robinson, exhibited a recent balance sheet showing Traille's financial situation. Those accounts show that Traille has:

- a. total assets of \$23,849,658.00 which includes available cash totalling \$606,540.00;
- b. a "share premium" of \$28,187,750.00; and
- c. profit for the first seven months of the year of \$10,128,528.00.

[7] In contrast, Mr Robinson deposed that CWJ has claimed from Traille, \$41,128,090.00, representing the judgment debt and interest thereon. The interest on the outstanding sum, Mr Robinson deposed, is accruing at the daily rate of \$3,715.18. In addition, Mr Robinson deposed, CWJ's attorneys-at-law have also filed a bill of costs claiming a total of \$32,330,814.03 in respect of the litigation to date.

[8] That situation, he contends, makes it imperative that the stay of execution should be granted. He said, at paragraph 30 of his affidavit filed on 14 August 2020:

“There is a risk that irremediable harm would be caused to Traille if the suspension of execution or stay of execution sought is not granted but no similar detriment to CWJ if the suspension of execution or stay of execution is ordered. I do verily believe that the orders sought for a suspension of execution or stay of execution would be less likely to cause injustice and would best accord with the interest of justice.”

[9] CWJ, in response, contends that the proposed appeal has no merit and will not succeed. The result of a stay, it asserts, will mean, an increase of the amount that Traille will owe. Based on the financial position that Traille has disclosed, CWJ contends, there would be no hope of CWJ recovering the additional amounts. The result would be significant prejudice to CWJ. It also boldly contends that in the unlikely event that the Privy Council rules in Traille’s favour, then CWJ is in a position to “restore [Traille] to the position which it would have been had the enforcement steps not been taken”. Ms Sola Hines, on behalf of CWJ, as part of her response to Mr Robinson’s affidavit, deposed at paragraph 12 of her affidavit, filed on 11 September 2020, as follows:

“In response to paragraph 30 of the 1st Robinson Affidavit, I state that it is in fact the opposite which will occur. CWJ will face greater risk of injustice should it be stymied in its efforts to obtain the fruits of its judgment debts, particularly as there is greater risk of non-recovery from an insolvent litigant.”

The principles governing an application for stay of execution

[10] The grant of a stay of execution is a discretionary order. **Linotype-Hell Finance v Baker** [1992] 4 All ER 887 is authority for the requirement, in order to be

granted a stay of execution, an applicant must show that it would otherwise be ruined. That requirement is no longer the law. The current position is set out in the unreported decisions of **Combi (Singapore) PTE Limited v Sriram and another** (unreported) Court of Appeal of England and Wales, judgment delivered 23 July 1997 and **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065.

[11] Both **Combi (Singapore) PTE Limited v Sriram** and **Hammond Suddard** state that the decision of whether or not to grant a stay of execution, turns on the justice of the case, based on all the circumstances. In **Combi (Singapore) PTE Limited v Sriram**, Phillips LJ stressed the aspects of the interest of justice and of irreparable harm. He stated at page 5 of his judgment:

“In my judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irreparable 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 irreparable 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. The starting point must be that the normal rule as indicated by Order 59, rule 13 is that there is no stay but, where the justice of that approach is in doubt, the answer may well depend upon the perceived strength of the appeal.” (Emphasis supplied)

[12] Clarke LJ in **Hammond Suddard** stated the requirement somewhat differently.

He stated at paragraph 22 of his judgment:

“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?**” (Emphasis supplied)

[13] This court has consistently applied those principles in considering applications for stays of execution (see, for example, **Kenneth Boswell v Selnor Developments Limited** [2017] JMCA App 30). The starting point of the assessment of any such application is, as Phillips LJ stated, whether there is some merit in the appeal or, put another way, whether the appeal has a real prospect of success.

A brief outline of the background facts

[14] Although the details of the case are set out in the court’s judgment, which Traille wishes to appeal, a brief outline of the background facts will assist the understanding of the current issue. The dispute between the parties centred on the payment of telephone calls tax (TCT). It commenced with the issue of whether the TCT was to be included in the deposit that Traille was required to pay in respect of an interconnection agreement (ICA) with CWJ. Traille obtained an interim injunction from the Supreme Court, which ordered CWJ to commence the interconnection. Thereafter, the parties

disputed whether the TCT was to be included in the monthly invoices that CWJ rendered to Traille, as that point was not determined by the Supreme Court at the time of the grant of the injunction.

[15] One of the resulting issues between the parties was which party was to pay the TCT to the tax administration authorities. Each insisted that it bore the responsibility. Their respective stances resulted in the parties duplicating the payment of TCT to the tax administration. By the time this court came to resolve the dispute in favour of CWJ, Traille owed CWJ millions of dollars in outstanding TCT, some of which CWJ managed to have the tax administration set off against other liability which CWJ had. In the interim, though, there was, as the judgments settled, also a substantial amount owed by Traille for interest on the sums that it had refused to pay to CWJ.

[16] CWJ contends that it was and is entitled to terminate the interconnection as a consequence of Traille's non-payment.

The merits of the appeal

[17] Traille disputes the correctness of this court's decision. Dr Barnett argued, on behalf of Traille, that it has a real prospect of success in its proposed appeal. He submitted that Traille is entitled to succeed on the issue of whether Traille is the party which bears the responsibility of paying over the TCT. He also submitted that it is important to determine whether CWJ is entitled to terminate the interconnection agreement in these circumstances.

[18] Dr Barnett contended that another issue to be determined by the proposed appeal, is that of the assessment of damages. The issue, he submitted, is whether it was the injunction which caused the duplication of TCT payment to the tax administration or, instead, that situation arose from a new dispute in relation to the interpretation of their duties under the Provisional Collection of Tax (Telephone Calls Tax) Order, 2012. He submitted that the new dispute resulted from the uncertainty as to the interpretation of the relevant statutory provisions. The uncertainty, he argued, also resulted in the parties duplicating payment to the tax administration. He argued that Traille has a meritorious argument that CWJ's losses did not flow from the injunction, but rather the subsequent dispute. He relied, in part, on **Cheltenham & Gloucester Building Society v Ricketts and others** [1993] 4 All ER 276.

[19] Mr Williams, on behalf of CWJ, contended that Traille had already failed to convince five judges in this jurisdiction of the merits of its case. He asserted that Traille, in its application for leave to appeal to Her Majesty in Council, argued that there were two questions to be determined: who is to pay the TCT and the recoverability of damages.

[20] Mr Williams argued that the respective courts have determined the first question, by finding that CWJ is responsible for paying the TCT to the tax administration. In relation to the second question, he submitted that the losses sustained by CWJ were the natural and probable results of the interim injunction granted in favour of Traille. He argued that it was not a subsequent dispute that caused the losses sustained by CWJ.

He asserted that Traille simply continuously refused to pay the TCT to CWJ. Mr Williams also argued that Dr Barnett has not indicated that the judgment of this court or the judgments of Batts J or Laing J was wrong to merit a stay of execution. He relied on **Hadley and another v Baxendale and others** (1854) 9 Exch 341 and **Galoo Ltd (in liquidation) and others v Bright Grahame Murray (a firm) and another** [1994] 1 WLR 1360, for support for his submissions.

[21] This court has already analysed and upheld, for the most part, the reasoning and conclusions of the judges in the court below. It is accepted, however, that, on the issue of the party that is responsible for paying over the TCT to the tax administration, an extended reasoning process resulted in the reliance on a Technical Note that was issued by the tax administration to assist the telecommunication industry.

[22] This court's analysis of the question of Traille's liability to CWJ in respect of the undertaking as to damages, resulted in this court disagreeing with Batts J on one aspect of the matter. The disagreement was identified at paragraph [117] of this court's judgment:

"...The fact that Brown J ordered that the calculation of the deposit should not include TCT did not implicitly mean that monthly invoices should not include TCT. Batts J, however, found to the contrary. He said at paragraph [59] that implicit in Brown J's order was that tax was not to be included in the monthly invoices. He cannot be said to be correct on that finding. The inclusion of TCT in the monthly billing constituted a different dispute..."

[23] Although, ultimately agreeing with Batts J on the result of the analysis, it is recognised that that area of disagreement is arguable before their Lordships.

[24] Based on that brief analysis, it cannot be said that Traille's proposed appeal is absolutely without merit.

[25] Dr Barnett argued that the case raises issues of "great general or public importance". The term is adapted from section 110(2)(a) of the Constitution, which allows for the grant of leave to appeal to the Privy Council if the appeal is not as of right. It is unnecessary to consider this submission, however, as Traille is entitled to appeal to the Privy Council as of right. In any event, the term, "great general or public importance", is not synonymous with a meritorious appeal.

[26] The conclusion that Traille's proposed appeal is not totally devoid of merit, requires a discussion of the issue of which party would incur the greater irremediable loss, depending on the decision that this court makes. That discussion indicates that the greater hardship would be to Traille.

The balance of hardship

[27] The evidence in respect of this issue is garnered from the respective affidavits of Mr Robinson and Ms Hines. On the one hand, Mr Robinson asserts that, even if it is successful on appeal, Traille's business would be destroyed if the stay is not granted. Ms Hines, on the other hand, asserts that, if the stay is not granted, but Traille should succeed on appeal, CWJ is able "to restore [Traille] to the position which it would have been had the enforcement steps not be taken" (see paragraph 10 of Ms Hines' affidavit).

[28] There is no gainsaying that Traille has the right to appeal to the Privy Council. The issue is whether it should be allowed to rack up additional debt to CWJ in the interim. If it is that it is currently unable to pay its debts, as Mr Robinson states (he had to personally advance the sum of \$1,000,000.00 to settle a sum outstanding to CWJ), Traille will be hard-pressed to pay any additional sums which would accrue up to the time of the resolution of the appeal in the Privy Council. Accruing at the rate of \$3,715.18 per day, the outstanding interest would quickly exceed whatever available cash Traille currently has. Based on Ms Hines' confidence about CWJ's financial position, it would seem that CWJ would, nonetheless, survive the loss.

[29] On the other hand, if the stay is refused, and Traille is unable to satisfy the debt, CWJ would be entitled to take such steps that would cause Traille to cease operation. According to Ms Hines, if Traille does find the means to pursue its appeal, and it is successful, it, will be able to recover from CWJ the sums paid in settlement of the judgment debt. Although there is no evidence as to how it would go about re-starting business, if it were successful on appeal, Ms Hines' bold assurance about restoring Traille, notwithstanding, there would undoubtedly be challenges in Traille re-establishing its business infrastructure and re-attracting its clients.

[30] A course that would be relevant to the consideration of this issue, is the requirement that an executing creditor is required to satisfy. Section 6 of The Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962, requires an executing creditor to provide security. It states:

“Where the judgment appealed from requires the appellant to pay money or to do any act, the Court shall have power, when granting leave to appeal, either to direct that the said judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just, and **in case the Court shall direct the said judgment to be carried into execution thereof, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such Order as Her Majesty in Council shall think fit to make** thereon.”
(Emphasis supplied)

[31] The requirement of security is not a viable alternative in these circumstances. Unless a plainly prohibitive security were required from CWJ, this course would be unlikely to satisfy Traille’s requirements in the event that the judgment were executed and Traille were successful in its appeal.

[32] Another course which could be considered is to have Traille make a payment as a condition for granting the stay. That option is also unlikely to be viable, as given the magnitude of the debt, and the dire financial straits that Traille is in, according to Mr Robinson, Traille would not be able to afford any sum which would be reasonable in the circumstances.

Conclusion

[33] Based on the above reasoning, Traille is entitled, as of right, to pursue its appeal to the Privy Council.

[34] It is arguable that its proposed appeal is not totally devoid of merit, in which case, the issue of where irremediable loss lies, becomes live. An analysis of that issue

leads to a decision that Traille is more likely to suffer irremediable loss, if the stay is refused, than would CWJ, if the stay is granted. In the circumstances the stay should be granted. There is, however, no financial condition for granting the stay which would be viable, at this time, based on Traille's precarious financial status.

[35] It is necessary to state, out of an abundance of caution, that it is only the execution of the judgment debt, set out in paragraph [1] of this judgment, and a termination of the interconnection that arises from that debt, which are stayed. All findings of law and declarations of entitlement, made in this court and in the court below, remain unaffected. Accordingly, Traille's obligations to CWJ under the interconnection agreement include the obligation to pay to CWJ the TCT that each monthly invoice attracts, based on those findings and declarations.

[36] It is also necessary to record that after the court reserved its decision, each party filed further affidavits. These documents have not been considered, as:

- a. they were not requested by the court;
- b. the court's permission to file them was neither sought nor granted; and
- c. the court heard no submissions in respect of them.

The filings were inappropriate.

EDWARDS JA

[37] I have read the draft judgment of my brother Brooks JA and agree with his reasoning and conclusion. I have nothing to add.

FOSTER-PUSEY JA

[38] I too have read the draft judgment of my brother Brooks JA and agree with his reasoning and conclusion. I have nothing to add.

BROOKS JA

ORDER

1. Leave is hereby granted to the applicant to appeal to Her Majesty in Council in pursuance of section 110(1)(a) of the Constitution of Jamaica on condition that the applicant, within 90 days of the date hereof:
 - a. enters into security in the sum of \$1,000.00 for the due prosecution of the appeal and the payment of all such costs as may become payable by the applicant in the event of the applicant not obtaining an order granting the applicant final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee ordering the applicant to pay costs of the appeal; and,
 - b. takes the necessary steps for the purposes of procuring the preparation of the record and the dispatch thereof to England.

2. The following are stayed pending the outcome of the appeal to Her Majesty in Council, or until further order of this court or of Her Majesty in Council:
 - a. execution of the judgment debt, created by the judgment of Laing J handed down on 22 May 2017; and
 - b. termination of the interconnection arising from the judgment debt.

3. It is a condition of the grant of the stay of execution that the applicant recognises and abides by all other rulings and orders of this court and of the court below, including that which affirms that it is the respondent that is responsible for paying over to the tax authorities, the Telephone Call Tax attracted by all monthly invoices rendered to the applicant by the respondent. Failure by the applicant to make the appropriate payments to the respondent in respect of monthly invoices shall not only render the respondent liable to the termination of the interconnection agreement according to the terms of that agreement but render the respondent liable to the removal of this stay of execution.
4. Liberty to apply.
5. Costs of the application shall be costs in the appeal to Her Majesty in Council.