

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 7/2017

APPLICATION 71/2018

BETWEEN UNITED GENERAL INSURANCE COMPANY APPLICANT
AND MARILYN HAMILTON RESPONDENT

Lord Anthony Gifford QC and Andre Sheckleford instructed by Hart Muirhead Fatta for the applicant

Captain Paul Beswick and Jason Mitchell instructed by Ballantyne Beswick and Co for the respondent

10 and 13 April 2018

IN CHAMBERS

BROOKS JA

[1] This is an application by United General Insurance Company Limited (UGI) in which it seeks a stay of execution of orders made by Edwards J in the Supreme Court on 9 March 2018. The orders arose from an assessment of damages due to Mrs Marilyn Hamilton resulting from a judgment, handed down on 13 December 2013, by Sinclair-Haynes J (as she then was) against UGI.

[2] The amount currently due to Mrs Hamilton has been calculated by her to be in excess of \$16,000,000.00. That sum does not represent the entire amount due under the judgment. Edwards J had stayed the execution of other aspects of the judgment,

which would result in further payments. The stay is operative until the determination of the appeal. By this application, UGI seeks to have the payment of amount currently due, save for a sum of \$40,000.00, stayed.

[3] UGI has appealed from the judgment of Sinclair-Haynes J. The appeal, though filed on 12 February 2014 has still not been heard. It is however set for hearing during the week of 14 May 2018.

The factual background

[4] The background to the litigation is that, on 28 July 2006, UGI dismissed Mrs Hamilton from her employment as its Information Systems Manager. She sued UGI for breach of the contract of employment. She claimed damages not only for the dismissal, but for the manner and circumstances thereof, and the effect that it had on her. There were other aspects to her claim but these need not be outlined here.

[5] UGI resisted the claim on a number of bases. It denied that it was in breach of contract. Among other bases for its defence, UGI contended that it terminated Mrs Hamilton's contract in accordance with the manner stipulated in the contract. It further asserted that the established law in respect of termination of employment prevented her from recovering damages for the manner of her dismissal.

[6] In her written judgment, Sinclair-Haynes J rejected UGI's position. She set out the bases on which Mrs Hamilton's damages were to be calculated, and she set the case for assessment of damages at a later date. The assessment exercise required information that was not then available to the court. Edwards J assessed the damages.

The orders

[7] The relevant orders made by Edwards J are as follows:

- “1. For damages for wrongful termination – Salary and emoluments for 12 months from July 2006 to June 2007, inclusive of employer’s contribution to pension, motor vehicle upkeep, gas allowance and lunch subsidy with an increase of 8.25% from January 2007 to June 2007 of \$3,567,836.88 with interest at 19.52% from the 28th July, 2006 to the 13th December, 2013 the day of judgment. Thereafter at 6% until payment;
2. For damages for handicap on the labour market, 2 years salary and emoluments, inclusive of motor vehicle upkeep, gas allowance and lunch subsidy, reflecting an increase of 8.25% per year as follows:-
 - a. From July 2007 to June 2008 the sum of \$3,779,449.49;
 - b. From July 2008 to June 2009 the sum of \$4,116,211.49;Total Salary and emoluments awarded for the three (3) years being \$11,463,497.86 with interest at 19.52% from the 28th July, 2006 to the 13th December, 2013 the day of judgment. Thereafter at 6% until payment;
3. Employer's contribution to pension to be refunded from January 2000 to June 2006 being \$740,000.700 [sic] with interest at 19.52% from the 30th November, 2009 to the 13th December, 2013 the date of Judgment. Thereafter at the rate of 6% until payment;
4. Motor vehicle allowance of \$40,000 with interest at 19.52% from 28th July, 2006 to the 13th December, 2013 the date of judgment. Thereafter at 6% until payment;
5. Health and Life insurance of \$1,785,355.56 with interest at 19.52% from 28th July, 2006 to the 13th

December, 2013 the date of judgment. Thereafter at 6% until payment;

6. The payment for one month notice already paid to the claimant is to be deducted from the judgment sum;
7. Costs of the assessment awarded to the Claimant to be agreed or taxed;
8. Stay of execution of orders number 2 and 3 until the determination of the appeal in the Court of Appeal;
9. Stay of execution granted on the award of 2/3rds of the costs of the assessment until the determination of the appeal in the Court of Appeal;
10. Claimant's Attorney-at-Law to prepare, file and serve Court orders made herein."

As set out in order 8, Edwards J stayed the execution of orders 2 and 3.

The application

[8] The present application is supported by an affidavit of Mr Andre Sheckleford, one of the attorneys-at-law representing UGI. In that affidavit, Mr Sheckleford asserted that the appeal has a real prospect of success and that there is a real risk that UGI may not be able to recover the monies from Mrs Hamilton if they are paid over to her.

[9] In addition, he emphasised that the appeal is soon to be heard. Mr Sheckleford contended that in the circumstances there is a risk of injustice to UGI if it were to be obliged to pay over the sum to Mrs Hamilton.

[10] Lord Gifford QC, on behalf of UGI, argued that there was a strong likelihood that the appeal would be successful. He argued that the orders, which the current application affect, were the subject of two of UGI's strongest bases of appeal, namely:

- a. the proper interpretation of the termination clause in Mrs Hamilton's contract of employment, favoured UGI's position, and
- b. the established common law principle established in **Addis v Gramophone Company Limited** [1909] AC 488, prevented the award of damages for the manner of dismissal.

[11] Learned Queen's Counsel further argued that one of the orders sought to be stayed, namely order 5, was so closely aligned to order 2, which had been stayed by Edwards J, that it ought also to have been stayed by her. He submitted that order 5, should, by logical extension, be now ordered to be stayed.

[12] Lord Gifford accepted that there was no evidence to support an assertion that Mrs Hamilton would not be able to repay the monies if they were paid over to her. He however asked that the court consider that it is a large sum and there would be a risk that UGI would have difficulty recovering it. He argued that the risk of injustice to UGI if the stay were not granted, was greater than the risk of injustice to Mrs Hamilton if the stay were granted. That, he submitted, was the real test to be satisfied in this application.

[13] In support of his submissions, learned Queen's Counsel referred to a number of decided cases, dealing with applications for stay of execution. These included **Watersports Enterprises Limited v Jamaica Grande Limited and Others,**

(unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 110/2008, Application No 159/2008, judgment delivered 4 February 2009, **Cable and Wireless Jamaica Limited (T/A Lime) v Digicel (Jamaica) Limited (formerly Mossel Jamaica Limited)**, (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 148/2009, Application No 196/2009, judgment delivered 16 December 2009 and **Seaton Campbell v Donna Rose-Brown and Another** [2016] JMCA App 35.

The response

[14] The application was stoutly resisted. Captain Beswick, on behalf of Mrs Hamilton, submitted that the application ought to be refused. Learned counsel argued that Mrs Hamilton had been too long denied the fruits of her deserved judgment. He submitted that a significant part of that delay had been caused by UGI. He contended that it had failed to abide by orders and rules of court, which were aimed at moving the litigation process, including the assessment of damages and the appeal, along.

[15] Captain Beswick submitted that the proximity of the date for hearing of the appeal was no guarantee that there would be an early resolution of the appeal. He referred to the fact that there were a number of judgments of this court that had been outstanding for years. Given the complexity of this case, he submitted, there was a real likelihood that the court's decision would be reserved, and given the court's current backlog of reserved judgments, delivery may well be delayed. The result, he argued, would be injustice to Mrs Hamilton, who is entitled to the fruits of her judgment.

[16] Learned counsel argued that every day for which payment to Mrs Hamilton is delayed, results in real financial loss to her. The interest rate being attracted by the judgment sum, he argued, was well below the commercial rates which ought to be paid on it.

[17] Captain Beswick expressed confidence that the judgment of Sinclair-Haynes J would be upheld. He argued that in conducting the balancing exercise that this court is obliged to undertake in assessing the application, the court should also note that:

- a. UGI has not asserted that it would be ruined or done irreparable harm if it paid the sums due;
- b. there was no evidence to support the contention that Mrs Hamilton would not be able to make repayment in the event of a successful appeal;
- c. there is a dominant principle that a successful litigant is entitled to the fruits of her judgment; and
- d. Edwards J considered an application for a stay of execution of the judgment and she stayed two of the seven relevant orders, accordingly this application is essentially an appeal from the exercise of her discretion and ought to be rejected as there has been no demonstration that she erred in principle.

[18] He submitted that the result of the balancing exercise should be a finding that the greater risk of injustice lay with granting rather than refusing a stay of execution of the judgment. Captain Beswick relied, for authority, on several cases, including **Virgin Atlantic v Premium Aircraft** [2009] EWCA Civ 1513, **Fernah Johnson-Brown v Marjorie McClure** [2015] JMCA App 19 and **Channus Block and Marl Quarry Limited v Curlon Orlando Lawrence** [2013] JMCA App 16.

The analysis

[19] Applications for stay are guided by the principle that the approach to be adopted is the one less likely to result in injustice. Two overarching principles apply. The first is that a successful litigant should not lightly be deprived of the fruits of his or her judgment and the second is that an appeal should not be stifled by the execution and a successful appeal should not be rendered nugatory. (See **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065 and **Combi (Singapore) Pte Ltd v Ramnath Sriram and Another** Court of Appeal of England and Wales FC2 97/6273 judgment delivered 23 July 1997).

[20] **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** was relied on in the submissions of both Lord Gifford and Captain Beswick. In that case Clarke LJ opined, at paragraph [22], that:

"...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?"

[21] Lawrence-Beswick JA (Ag), as she then was, also relied on **Hammond Suddard** in her judgment in **Caribbean Cement Company Limited v Freight Management Limited** [2013] JMCA App 29. She said, at paragraph [16]:

"[The] authorities show that in determining whether to grant or refuse an application for the stay of execution pending appeal, the court should consider (i) where the interests of justice lie and that (ii) the respondent should not be unduly deprived of the fruits of his successful litigation. Further, in determining where the interests of justice lie, consideration must be given to:

- (a) The applicant's prospect of success in the pending appeal.
- (b) The real risk of injustice to one or both parties in recovering or enforcing the judgment at the determination of the appeal.
- (c) The financial hardship to be suffered by the applicant if the judgment is enforced."

That assessment is gratefully accepted as being an accurate guide for conducting the present exercise.

[22] In this case, the competing factors are, firstly, that Mrs Hamilton has, since 13 December 2013, had a judgment in her favour. The judgment by itself is something of value. It has, since 9 March 2018, been given quantification by virtue of an assessment of damages conducted before Edwards J.

[23] An important factor is that there is no indication that the payment of the judgment sum could jeopardize UGI's financial position.

[24] Also important is the fact that the matter has been in litigation for over 10 years.

[25] On the converse side is UGI's contention that it has an appeal with a good prospect of success and that, were the judgment to be executed, there is no assurance that the monies could be recovered from Mrs Hamilton. UGI also contended that the appeal is shortly to be heard, having been set for hearing during the week of 14 May 2018.

[26] Whereas it is true that the appeal is in respect of a point of law which may well be decided either way and therefore it has a real prospect of success, Mrs Hamilton should not be further deprived of the fruits of her judgment. It is recognized that, bearing in mind the importance of the point of law and its likely wide impact, the decision may well be reserved and there will be a further delay in Mrs Hamilton receiving the fruits of her judgment, if the appeal is unsuccessful.

[27] An order should therefore be made allowing for some payment to be made.

[28] There is, however, some risk that she may not be able to repay any sums paid under the judgment should the appeal be successful. Although UGI has provided no information to support the likelihood of such an event, it cannot be ignored that Mrs Hamilton has, as part of her case, indicated that the manner of her dismissal has, since

then, psychologically prevented her from taking other contracts of employment. That is an indication, not only of a need for funds, but of a risk of inability to repay.

[29] It is recognized that there is already a partial stay of execution in place.

[30] It appears that the justice of the case requires that a stay of execution be granted on condition of a payment being made to Mrs Hamilton. The sum to be paid should reflect the issues that are in contention in the appeal. In other words, not everything should be paid to Ms Hamilton at this stage but the amount paid should be meaningful.

[31] The orders therefore are:

1. The execution of orders 1, 4, 5 and 7 of the orders handed down by Edwards J on 9 March 2018 is hereby stayed until the determination of the appeal.
2. The stay of execution is conditional on the applicant paying the sum of \$3,500,000.00 to the respondent on or before 20 April 2018.
3. No order as to costs.