

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 56/2012

APPLICATION NO 214/2012

<b>BETWEEN</b>	<b>WESTERN CEMENT CO LTD</b>	<b>APPLICANT</b>
<b>AND</b>	<b>NATIONAL INVESTMENT BANK OF JAMAICA</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	<b>CLARENDON LIME COMPANY LTD</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>AND</b>	<b>LIMESTONE CORPORATION OF JAMAICA LTD</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>AND</b>	<b>DR VINCENT LAWRENCE</b>	<b>4<sup>TH</sup> RESPONDENT</b>
<b>AND</b>	<b>KIRBY CLARKE (Representative of the Estate of Horace Clarke dec'd)</b>	<b>5<sup>TH</sup> RESPONDENT</b>

**Lord Anthony Gifford QC and Miguel Williams instructed by Livingston Alexander and Levy for the applicant**

**Charles Piper and Miss Marsha Locke instructed by Charles E Piper and Associates for the 1<sup>st</sup> respondent**

**Garth McBean and Miss Teri-Ann Lawson instructed by DunnCox for 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents**

**Michael Hylton QC and Miss Melissa McLeod instructed by Michael Hylton and Associates for the 4<sup>th</sup> Respondent**

## **ORAL JUDGMENT**

**14 May 2013**

### **IN CHAMBERS**

#### **BROOKS JA**

[1] The applicant, Western Cement Co Ltd, in the instant case seeks a stay of execution pending an appeal against a judgment by Sykes J handed down on 16 March 2012. In that judgment the learned trial judge gave judgment for the respondents herein on the claim and judgment to the 1<sup>st</sup> respondent, National Investment Bank of Jamaica, on the counter-claim.

[2] In the claim, the applicant sought damages for economic loss suffered by it, due to, as it alleged, misfeasance in public office by one of the defendants, who, at the material time, was the minister of government holding the portfolio, under which the applicant's enterprise fell. The applicant also alleged a conspiracy between the respondents, or some of them, in furtherance of that misfeasance. The counter-claim arose from a loan that the first respondent had made to the applicant. That loan was guaranteed by the applicant's directors, or, at least some of them. It had not been repaid.

[3] The formal order of Sykes J's judgment states:

- “1. Judgment for the First, Second, Third, Fourth and Fifth Defendants on the claim;
2. Judgment for the First Defendant against the Claimants in the sums of US\$7,918,489.12 and J\$9,533,955.14 on the counterclaim with interest on the sum of US\$582,398.69 at the rate of 13% per annum on the sum of US\$3,258,722.37 at the rate of 14% per annum and on the sum of US\$4,077,368.06 at the rate of 12% per annum from June 1, 2010 to the date of Judgment;
3. Stay of execution granted for six (6) weeks.”

[4] The application for stay, which is strenuously resisted by all the respondents, is based on the assertions that:

- (a) The applicant’s appeal has a good prospect of success, and
- (b) If the application is refused and the 1<sup>st</sup> respondent executes the judgment, it will result in the appeal becoming stifled.

[5] There is no real dispute as to the legal bases on which this court should consider the application. The case of **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065 has long been accepted by this court as correctly setting out the approach. The relevant position is set out at para 22 of the 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?”

[6] In utilising that approach, there must first, however, be some merit to the appeal. In light of the very serious issues raised by the claim and the finding of the learned trial judge, I have no difficulty in finding that there are serious issues raised, in relatively uncharted waters, and it is important that the appeal be allowed to be pursued, if that is at all possible. It is accepted that there have been submissions to the effect that the appeal has no real prospect of success, but I will not consider that aspect in light of the apparent need for guidance from this court on the issue of misfeasance in public office, as has been alleged by the applicant. It therefore remains to examine the circumstances of this case and, in particular, the status of the applicant.

[7] The first aspect to be noted is that the applicant was already in receivership when the claim in the court below was filed. It is the 1<sup>st</sup> respondent who had loaned money to the applicant and who had placed it in receivership. The judgment on the counter-claim concerns that loan.

[8] The second aspect to be noted is that the claim and this appeal have been instituted without the consent of the receiver. There is also no undertaking in place to indemnify the receiver as to the costs of the claim or of the appeal. Lord Gifford, for the applicant, has stated during his submissions that Mr Wong Ken, one of the applicant's directors, is prepared to give such an indemnity, if necessary. That will be a consideration for these purposes.

[9] The third aspect of importance is that there has been no appeal against the counter-claim, which is in respect of the loans advanced by the 1<sup>st</sup> respondent to the applicant. Lord Gifford has submitted that if the appeal is successful then not only would any monies owed by the applicant be subsumed in what would be due by the respondents to the applicant but that the counter-claim may properly fall away as well, bearing in mind the fact that the defence to the counter-claim repeated in large measure the relevant part of the applicant's claim in the court below.

[10] A fourth aspect is that the equipment forming the applicant's assets and partial security for the loan has been left in a state where some of it was eventually sold for scrap metal. The rest has not been able to secure any interest from would-be purchasers despite the efforts of the receiver. Other assets, including realty, have remained unsold but despite those assets, the applicant is highly insolvent. In the meantime, the debt to the 1<sup>st</sup> respondent would, of course, be constantly increasing. The applicant's status is set out at para 10 of the affidavit of the receiver, Mr Kenneth Tomlinson. That affidavit was filed on 29 October 2012.

[11] The fifth aspect to be considered is that there is no assertion that the 1<sup>st</sup> respondent would not be in a position to pay any judgment which may be awarded to the applicant if the appeal should be successful.

[12] Against that background, I consider the questions as posed by the court in **Hammond Suddard**.

**(a) If a stay is refused what are the risks of the appeal being stifled?**

[13] Although the applicant states that the result of a refusal of the application would be a stifling of the appeal, there is nothing to support that statement. In considering the applicant's statement, it is noted that the circumstances of this appeal are somewhat unusual. The applicant is, at present, the only appellant. It is not financing the appeal and Mr Wong Ken who has filed affidavits in support of the application has stated that it is he who is financing the appeal. He has not stated how an execution of the judgment would affect that situation. What he does say, is that he, who was a claimant in the court below, and a judgment debtor by virtue of the judgment of Sykes J, is unable to satisfy the debt. He does not provide any evidence to support that assertion, nor does he state that he is the only person available to finance the appeal.

[14] The authorities suggest that bald statements are not sufficient to support an assertion that an appeal would be stifled. There is therefore nothing compelling from the applicant in this regard. In its current financial state, the applicant is unlikely to be

affected by any attempt at execution. The grant of a stay of execution would therefore be otiose. Indeed, one gets the impression that a stay of execution would only be of benefit to the judgment debtors that have not appealed against the judgment; they having abandoned the claim in the court below.

**(b) If a stay is granted and the appeal fails, what are the risks that the 1<sup>st</sup> respondent will be unable to enforce the judgment?**

[15] In this case, as in **Hammond Suddard**, the result of granting the stay of execution would only be that enforcement would be no easier. The debt would, however, be greater and the value of any remaining equipment would be further reduced. The respondents would, therefore, be worse off and the applicant, not any better off.

**(c) If the stay is refused and the appeal is successful and judgment is enforced, in the meantime what are the risks that the applicant would not be able to recover the monies paid?**

[16] As mentioned before there has been no assertion that the 1<sup>st</sup> respondent will be unable to pay such sums as would be due to the applicant in the event of a successful appeal.

**(d) The essential question, similar to that posed in National Commercial Bank v Olint Corp, is, what is the risk of irredeemable injustice to one or other party if the court grants or refuses a stay?**

[17] The circumstances looked at as a whole, support refusal of the stay. It is best that the respondent be able to proceed with recovering what it can. This applicant's

business has suffered to the extent where it is unlikely, without massive capital injections, to even restart operation. No assertion has been made that any such injection is waiting in the wings, even if it were to succeed on appeal. Lord Gifford pointed to possible profits that the applicant would have made, were it not for the torts of the respondents. There is, however, no evidence that recovering monies from the respondents would resuscitate the applicant. Its future seems to lie in liquidation.

[18] In the circumstances, its shareholders would have their interest in a capital payout which would best be achieved by the receiver carrying out his job. On the other hand, the 1<sup>st</sup> respondent would be best served by the realisation of the applicant's assets and the settling of the debts owed to it. If, perchance, there is a successful appeal and it has to return monies to the applicant then, based on what has been said earlier, the more liquid the applicant is, the easier it will be to determine how much is to be paid.

Based on all the above, the application for a stay of execution is refused.

Costs to the respondents to be taxed if not agreed.