Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2004 HCV 421

IN CHAMBERS

BETWEEN	ALBERTHA DEWDNEY OLIVE KNIGHT MARCIA DEWDNEY GLORIA DEWDNEY ORRETT DEWDNEY LORNA DEWDNEY-ELLIS NORMA DEWDNEY VINCENT DEWDNEY OWEN DEWDNEY DOROTHY DEWDNEY-BROWN VIVIENNE DEWDNEY ROY DEWDNEY-ELLIS ICYLIN DEWDNEY-GOLDING (Members of the Family of Florence Dewdney)	CLAIMANTS
AND	ENID LOUISE BROWN-PARSONS	1ST DEFENDANT
AND	CLIVE NEWMAN	2ND DEFENDANT

Miss Danielle Archer instructed by Kinghorn and Kinghorn for Claimants/Respondents.

Miss Jacqueline Cummings instructed by Archer and Cummings for Defendants/Applicants

Civil Procedure -Application for stay of execution pending appeal – Whether the court has jurisdiction to grant a stay – principles governing the grant

Heard: 12th and 20th August 2009

BROOKS, J.

Although Florence Dewdney died testate in the year 1968 and her will was probated, Florence's grand-children and daughter-in-law have brought a claim in their own names, asserting that they are the beneficial owners of a parcel of land which formed part of Florence's estate. The claimants also seek to have rescinded, a registered title comprising the said land. The registration, they say, was secured by fraud.

The defendants to the claim are Mrs. Enid Louise Brown-Parsons and her son Mr. Clive Newman. Mrs. Brown-Parsons is, however, the sole registered proprietor of the disputed land. She is Florence's daughter and also a beneficiary of Florence's estate.

Despite the question-marks concerning their status as claimants and Mr. Newman's as a defendant, the Dewdney clan have secured a judgment against Mrs. Brown-Parsons and Mr. Newman. This occurred when Mrs. Brown-Parsons and her previous attorneys-at-law arrived at an impasse. That situation resulted in her failure to meet deadlines set at the Case Management Conference. The statements of defence were struck out as a consequence and judgment entered pursuant to an application to a judge of this court. An application to set aside the judgment was refused and that latter decision is the subject of an appeal to the Court of Appeal. Mrs. Brown-Parsons now seeks a stay of execution of the judgment pending the appeal being decided.

The questions to be decided are what principles govern the consideration of the application for a stay and whether the judgment should be stayed in these circumstances.

Applicants' submissions

Miss Cummings, on behalf of Mrs. Brown-Parsons, submitted that if the judgment was enforced and the defendants were successful in their appeal then the appeal would be rendered nugatory. The main reason behind that submission was that the Dewdneys have, through their attorneys-at-law, threatened to demolish Mrs. Brown-Parsons' house. Members of the Dewdney family have also entered the land and cut fruit trees growing there. It is said that they are likely to cut other trees if not restrained by the court.

Miss Cummings also submits that:

1. The appeal has a good prospect of success.

2. A stay will not result in any detriment or prejudice to the Dewdneys.

Respondent's Submissions

Miss Archer's submissions, on behalf of the Dewdneys, may be summarized thus:

1. It is rule 42.13.of the Civil Procedure Rules (CPR) which governs this application. That rule requires evidence of developments which could not have been put before the court prior to the judgment being delivered. There is no evidence of any such development supporting this application.
2. The court does have an inherent jurisdiction to control its process which includes the power to grant of a stay of execution of its judgments. To benefit from the court's discretion to grant a stay, however, the applicant must show a level of hardship which meets the standard required by the court. The applicant must also show that his appeal would be stifled if the stay were granted.
3. Mrs. Brown-Parsons has not met the required standard and therefore the application should be refused.

In support of her submissions, Miss Archer cited paragraph 71.38 of *Blackstone's Civil Practice 2004* and *Hammond Suddard Solicitors v Agrichem International Holdings Ltd.* [2001] EWCA Civ. 2065 (delivered 18/12/2000).

Bases on which a stay may be granted

Jurisdiction to grant a stay of execution

Although Miss Archer conceded that this court has an inherent jurisdiction to stay execution of its judgments, I found, in preparing this opinion, that the matter was not as definitive as I had first assumed. It has long been the law that the mere lodging of an

appeal does not operate as a stay of the order or judgment of the court. So it was, by virtue of section 21 (1) (a) of the Judicature (Court of Appeal) Rules 1962 and so it is, by virtue of rule 2.14 of the Court of Appeal Rules 2002 which replace the 1962 rules. Rule 2.14 presently gives authority to the Court of Appeal to order a stay, if it is so minded. What however gives this court the power to stay execution of its orders or judgments?

By rule 42.13 of the Civil Procedure Rules 2002 (the CPR) a judgment debtor may apply to this court for it to stay execution of a judgment or order which it has made. The rule states as follows:

> "A judgment debtor may apply to the court to stay execution or other relief on the grounds of –
> (a) matters which have occurred since the date of the judgment or order; or
> (b) facts which arose too late to be put before the court at trial,
> and the court may grant such relief, upon such terms, as it thinks just"

The term "judgment debtor" is not defined in Part 42 of the CPR. It is, however, defined in Part 43 (for that Part) as meaning, "a person who is liable to enforcement under (a) judgment or order, even though the judgment or order is not a money judgment". (See rule 43.1.) The English Civil Procedure Rules have a similar, though not identical, provision to rule 42.13. RSC 45.11 stipulates:

> "Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the court may by order grant such relief, and on such terms, as it thinks just."

It may be appropriate, in the absence of any inconsistency between Part 42 and Part 43 in the application of such a definition, to apply the definition to rule 42.13 for these purposes. The filing of the appeal could be termed a matter which has occurred since the date that the judgment was delivered in this case. There may therefore be a

basis under rule 42.13 for the grant of a stay of execution. Despite the finding to that effect in *Pfizer Ltd. v Medimpex Jamaica Ltd. and others* (CL 2002 / P 040 unreported) a decision which I delivered on 4th July 2005, I have much reservation about a finding that the filing of the appeal was contemplated, in this context, as being a matter which occurred since the date of the judgment.

If the construction of rule 42.13 is found to be too strained, then enquiry may be made as to whether this court has a general power to grant a stay of execution of its judgments and orders. This power would, if it exists, be a part of its inherent jurisdiction to control its process. Section 27 of the Judicature (Supreme Court) Act declares this court to be a superior court of record. It may exercise all the jurisdiction, power and authority of the several courts which it replaced in 1880. There has, however, been some difference of view in the decided cases in this country as to whether the power to grant a stay exists.

In *Brown v Trelawny Parish Council* (1967) 10 J.L.R. 213, counsel for the Plaintiff submitted to Smith J. (as he then was), that "any judge of the Supreme Court has an inherent power to make an order staying the execution, for a time fixed by him, of any order which he makes". The learned judge did not accept the submission as valid. He expressed doubt as to whether any such jurisdiction existed. After assessing the reasoning of Lord Esher, M.R. in *Attorney-General v Emerson* [1889] 24 Q.B.D. 56, Smith J. opined at page 218 D-E, that whereas the English courts seem to derive their power to stay a judgment, from O. 58 r.16 of their then rules, a Supreme Court judge in Jamaica probably had no such power.

The validity of Smith, J's, reasoning on other aspects of his findings, was expressly doubted by a majority of the Court of Appeal in *Mitchell v Dabdoub and others*, SCCA 95/2001, an unreported decision delivered on 25/10/2001. Langrin, J.A. stated at page 18, that the decision in *Brown v Trelawny Parish Council* was made *per incuriam* and should not be followed. It is implicit in the reasoning of Forte, P. at page 11 of his judgment in *Mitchell* that he accepted that a judge of this court has an inherent jurisdiction to grant a stay of execution of a judgment.

That this court has such a jurisdiction was the specific finding of Swaby, J.A. sitting as a single Judge in the Court of Appeal in *Shields v Graham* (1974) 12 J.L.R. 1497. He said at page 1498 H –I:

> "In the absence of a pending appeal **the application for a stay of execution** for six weeks to enable the appellant to file her appeal made to the trial judge in this case **was invoking the inherent jurisdiction of the court below**, or statutory powers, not being those of the Court of Appeal Rules, 1962." (Emphasis added)

The learned judge of appeal cited paragraph 49 of Vol. 16 *Halsbury's Laws of England* 3rd Edition, to support his view that such an inherent power existed. The learned editors of that work then said:

> "49. Stay of Execution... (the court) has an inherent jurisdiction over all judgments or orders which it has made, under which it can stay execution in all cases – *Polini v Gray, Sturla v Freccia* (1879) 12 Ch. D. 438 either for a definite or unlimited period – see *Marine and General Mutual Life Assurance Society v Feltwell Fen Second District Drainage Board*, [1945] K.B. 394."

That opinion by the learned editors, was criticized in *London Permanent Benefit Building Society v deBaer* [1969] 1 Ch. 321, [1969] 1 All ER 372. Plowman, J. examined the cases cited by the learned editors and concluded that they did not support the proposition then stated in *Halsbury's*. Since that time, the learned editors have

modified their statement of the law. At paragraph 195 of Volume 17 (1) of the 4th Edition (Reissue) of their work, they say:

> "The court's power to stay proceedings should not be confused with its power to stay execution of a final judgment or order. The court has an inherent jurisdiction to control its own proceedings...The court does not, however, have an inherent jurisdiction over all judgments or orders which it has made under which it can stay execution in all cases. On the contrary, the court's inherent jurisdiction to stay the execution of a judgment or order is limited in its extent, and can only be exercised on grounds that are relevant to a stay of the enforcement proceedings themselves and not to matters which may operate as a defence in law or relief in equity, for such matters must be specifically raised by way of defence in the claim itself....The court has no inherent jurisdiction or other power to stay or suspend the execution of a judgment or order for possession of land against a trespasser."

There have been judicial differences of opinion on this issue both in this country and in England. Their Lordships in the Privy Council have however weighed in on the dispute. In the case of *Bibby and another v Partap and others* (1996) 48 WIR 371, in an appeal from Trinidad and Tobago, their Lordships have provided guidance on the issue. Unfortunately, no cases were cited to support the particular point. Their Lordships said:

> "Under English law **a court of first instance which grants relief, whether interlocutory or final, has an inherent power to suspend ("stay") its order until an appeal** or would-be appeal to the Court of Appeal is disposed of. The Court of Appal has a like jurisdiction. **The existence of these parallel jurisdictions is assumed, and thereby confirmed, by RSC Order 59, rule 13(1)**... (Emphasis added)

Their Lordships then quoted the rule, which is in very similar terms to rule 2.14 of our Court of Appeal Rules 2002 and of similar effect to the then Order 59, rule 22(1) of the Rules of the Supreme Court of Trinidad and Tobago. It should be noted that the equivalent in the present Civil Procedure Rules of England is rule 52.7. Although it is not a decision on appeal from Jamaica and therefore not binding on this court, the relevant legislation in both countries is materially indistinguishable and so the decision is highly persuasive. It should be pointed out that there is no longer a requirement to

exhaust the remedies available at first instance before applying to the Court of Appeal for a stay of execution pending appeal. (See rule 2.11 (1) (b) of the Court of Appeal Rules 2002 and *Thomas v Innis* SCCA 99/05 (delivered 14/2/06)).

There have been recent decisions in this court which lend me assistance in this exercise. The first is that of Sykes, J. in *In the matter of Dyoll Insurance Co. Ltd. (In Liquidation)* HCV 1267 of 2005 (delivered 3/8/2006). The other is a decision of Anderson, J. in *Stewart v Issa and others* HCV 5004 of 2007 (delivered 24/3/2009). In both these cases the learned judges considered the basis for the jurisdiction to grant a stay of execution. Sykes, J, in the course of deciding to grant a stay, said at paragraph 10:

> "We are now at the stage where the following principles are not in doubt:
>
> a. a court of first instance and a Court of Appeal have concurrent original jurisdiction to take such steps and make such orders as are necessary to ensure that the court's judgments are not made valueless by an unjustifiable disposal of the assets..."

Anderson, J. at pages 6-7 also sought to set out guidelines. He said:

> "From these passages a number of useful rules can be recognized:
>
> 1. The grant of a stay lies within the discretion of the court; previous indications as to how that discretion has been exercised are instructive but not prescriptive and each case will depend on its own unique circumstances;"

Based on the *dicta* in the cases of *Mitchell v Dabdoub, Bibby v Partap, Dyoll Insurance* and *Stewart v Issa* as well as the long established practice in this court of granting stays of execution pending appeal, exercised in innumerable cases, I find that there is an inherent power which this court possesses and which I may exercise, to stay execution of a judgment in an appropriate case.

Considerations for the exercise of the discretion

Our Court of Appeal, in the case of *Flowers, Foliage and Plants of Jamaica and ors. v. Jamaica Citizens Bank Ltd.* (1997) 34 J.L.R. 447, has adopted the position that an applicant for a stay of execution, no longer has to satisfy the court that if the damages and costs were paid, there would be no reasonable prospect of recovering them if the appeal succeeds. The court, accepted the principle 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 measure of success, that is a legitimate ground for granting a stay".

Traditionally, there have been two principles which must be borne in mind at all times, when considering a stay of execution. The primary one is that a successful litigant should not be deprived of the fruits of his judgment (*The Annot Lyle* (1886) 11 P. 141 at p.146). The second is that the court ought to see that a party exercising his right to appeal does not have his appeal, if successful, rendered nugatory. (See *Wilson v Church (No 2)* (1879) 12 Ch. D 454 at p.458-9).

In recent years the approach of the court, has been more holistic. In *Winchester Cigarette Machinery Ltd. v. Payne and Anor. (No 2)* TLR (15th January 1993), it was held that it is now a matter of applying common sense and the balance of advantage. The starting point, however, will be the first traditional principle stated above. In *Hammond Suddard,* cited by Miss Archer, the English Court of Appeal stated, at paragraph 22, that in approaching the issue, the court should look at all the circumstances of the case and make a decision which will avoid injustice. Clarke, L.J. said:

> "Whether the court will 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?"

I shall adopt the approach recommended by the learned Law Lord.

The application of the principles to the instant case

If the stay is refused what are the risks of the appeal being stifled?

The major fear that Mrs. Brown-Parsons has, according to Miss Cummings, is that the house, which Mrs. Brown-Parsons has occupied (personally or otherwise) for over thirty years, is at risk of being demolished. In addition there is, submitted Miss Cummings, a real prospect of fruit trees on the disputed land being cut down. There is also an order for the certificate of title to be rescinded. None of these developments could directly prevent the appeal being prosecuted. Mrs. Brown-Parsons has not provided any evidence of the appeal being stifled as a result of the execution of the judgment. This consideration is resolved in favour of the Dewdneys.

If the stay is granted and the appeal fails, what are the risks that the Dewdneys will be unable to enforce the judgment?

The Dewdneys have pointed out that order (e) of the judgment restrains Mrs. Brown-Parsons from "selling, transferring or otherwise disposing of the disputed land". To stay that aspect of the order may well pose a risk to the judgment being enforced, if the land were transferred to a third person. I accept that that aspect should not be stayed.

There is no other risk of a delay in execution permanently depriving the Dewdneys of the fruits of their judgment. The appeal, as I understand it, is a procedural appeal. The result is likely to be very quickly known. If the claim is to thereafter proceed to trial there will, however, be a longer wait.

It is not contested that the disputed land has been used for the burial of family members. The major drawback to a delay in execution is that, in the event of a death in the family, burial could not take place on the disputed land without Mrs. Brown-Parsons' consent. In all the circumstances this question, despite the drawback just mentioned, should be resolved in favour of Mrs. Brown-Parsons.

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 compensation for any loss suffered by Mrs. Brown-Parsons?

Execution of the judgment carries with it the very real prospect of Mrs. Brown-Parsons' home being destroyed, or at least severely damaged. Such a result was promised by the attorneys-at-law representing the Dewdneys. Although it has not been said that the Dewdneys would not be able to compensate her for that loss, in the event that she were successful in the appeal and at the hoped-for trial, common sense calls for avoiding the loss in the first place. A similar reasoning applies to the other major remedy secured by the judgment. Why should there be the administrative exercise, and the cost associated with it, of rescinding a Certificate of Title, which, if Mrs. Brown-Parsons prevails, would have to be undone? The cutting of trees carries with it other considerations for the environment. Once cut, trees are not normally quickly replaced. This consideration is resolved in favour of Mrs. Brown-Parsons.

The prospects of the appeal being successful

Although not mentioned by Clarke, L.J. as one of the considerations, the prospects of the appeal being successful should be one of the considerations in a common-sense approach to an application for a stay. Even if the questions were all

answered in favour of the appellant, should a stay be granted in the face of a patently hopeless appeal? It is my view that that would not be consistent with avoiding injustice.

It seems to me that a number of things are in favour of Mrs. Brown-Parsons being allowed to defend this claim, not the least being the status of the claimants. Another is the appropriateness of order (g) of the judgment, which placed the disputed land in the control of two of the Dewdneys in trust for the rest of the family. One cannot help but wonder what is the status of Florence's personal representative, since it is Florence's estate which is said to be the victim of Mrs. Brown-Parsons' alleged actions. These points have not been pleaded in the statement of defence and no interlocutory point was taken in respect of the former, but the court may allow Mrs. Brown-Parsons her day in court if reasonably possible.

Costs

The Dewdneys have complained that none of the orders for costs, made thus far, have been met. Miss Cummings has pointed out that none of the costs have so far been agreed or taxed. In my view Mrs. Brown-Parsons being the owner of real property in Jamaica has an asset which may be used to offset, if needs be, orders for costs. The issue of costs does not deprive her of her entitlement to pursue the appeal.

Conclusion

As a superior court of record this court has an inherent jurisdiction over all judgments or orders which it may make. In order to prevent appeals from its judgments being rendered nugatory, it may stay execution of any such judgment or order, pending appeals therefrom.

In the instant case, a stay of execution is the order most likely to avoid injustice. Mrs. Brown-Parsons would suffer greater prejudice if the judgment was executed, and she was later to prevail, than the Dewdneys would suffer if there were a delay in the enforcement of a judgment, which was eventually upheld. A stay should accordingly be granted.

The order therefore, is as follows:

1. The final judgment in this claim, handed down on January 21, 2009 is hereby stayed pending the determination of the appeal from the decision of Sinclair-Haynes, J.;
2. The Defendants are hereby restrained, whether by themselves, their servants and/or agents from selling, charging, transferring or otherwise disposing of the land comprised in Certificate of Title registered at Volume 1266 Folio 709 of the Register Book of Titles;
3. Costs, to be taxed if not agreed, shall be costs in the claim.