[2018] JMCC Comm 21

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2011 CD 00088

(Formerly 2007 HCV 01124)

BETWEEN	**MARILYN HAMILTON**	**CLAIMANT**
AND	**UNITED GENERAL INSURANCE COMPANY LTD.**	**DEFENDANT**

Writ of Seizure and Sale – Application for Stay- Appeal against Issue of writ of seizure and sale for a default costs certificate- Whether Civil Procedure Rules require execution of a money judgment- Whether Defendant entitled to 14 days after default costs certificate is issued – CPR rules 46.4 (1) and 65. 12 (b) - Whether risk of injustice.

Mr. Conrad George and Andre Sheckleford instructed by Hart Muirhead & Fatta for the Claimant

Mr. Paul Beswick, Georgia Buckley and Jason Mitchell instructed by Ballantyne Beswick & Co for the Defendant

IN CHAMBERS

HEARD : **20th April 2018, 10th May 2018 and 14th May 2018.**

COR : **BATTS J.**

[1] On the 14th May 2018, I made the following orders:

1) Stay of Execution granted in respect of the Order for Seizure and Sale granted with respect to the Default Cost Certificate issued by the Registrar on the 12th March 2018.

2) The Stay of Execution is granted on condition that the amount of $1.6 million already paid into court will remain there until the further order of the court.

I promised then to put my reasons in writing at a later date. This judgment fulfills that promise.

[2] This application is just one small part of apparently never ending litigation. It is an application by the Defendant to have execution stayed with respect to a Default Cost Certificate issued by the Registrar. The matter arose in the following circumstances:

(1) The Claimant obtained judgment after a trial.

(2) The Defendant appealed to the Court of Appeal against that judgment.

(3) The Defendant was dilatory in prosecuting that appeal

(4) In consequence a Judge of Appeal made orders for costs, on two (2) occasions in chambers, both in favour of the Claimant.

(5) The Claimant filed separate Bills of Taxation in respect of each order for costs.

(6) The Defendant, due apparently to inadvertence and/or some administrative issues, filed Points of Dispute in relation to only one of the two Bills of Costs.

(7) The Claimant promptly applied for a Default Costs Certificate, in relation to the other Bill of Costs, and this was issued by the Registrar of the Court of Appeal on the 12th March 2018.

(8) The Claimant applied for and obtained in the Supreme Court, on the 13th March 2018, an Order for Seizure and Sale with respect to the Default Costs Certificate.

(9) The Defendant has appealed against the Default Costs Certificate which was issued by the Registrar of the Court of Appeal.

[3] The Defendant has also appealed to a Judge of the Supreme Court against the decision of the Acting Registrar of the Supreme Court to issue an Order for Seizure and Sale in respect of the Default Costs Certificate. No date has been fixed for the hearing of that appeal which was filed on the 15th March 2018. The application before me is one which seeks to stay execution of the Writ of Seizure and Sale pending the hearing of that appeal.

[4] On the first morning of the hearing Mr. Beswick applied to cross-examine the affiant in support of the Defendant's application. Mr. Beswick had on a prior occasion given notice of his intention so to do. I allowed the affiant to be cross-examined. The affiant was Mr. Andre Sheckleford, the attorney announced as co-counsel in this matter. Mr. Beswick's cross-examination, although detailed and in his usual style quite pointed, did not in any significant way impact the issues I have to consider. The exercise however underscores the undesirability of a practice, which seems to be gaining popularity, whereby attorneys swear affidavits in matters in which they intend to appear. If attorneys deem it necessary to swear to an affidavit they should not appear as counsel, or be announced as such, in that application.

[5] Mr. Paul Beswick, in the course of his submissions, invited me to treat the hearing of this application for a stay pending appeal as the appeal. He submitted that, in the same way as an application for leave to appeal is treated as the appeal, a similar approach was appropriate because the same issues are considered. Mr. George resisted this suggestion as the appeal was not before me. I agreed with Mr. George. I determined only the question whether a stay should be granted. The question to be considered in that regard is, among

other things, whether there is a serious question to me tried, not whether the Defendant will ultimately succeed. In any event, as the appeal is not before me, the Defendant is entitled to say they might have brought more authorities had they known the appeal was to be finally determined on this occasion.

[6] The test applicable to determine whether or not a stay of execution is to be granted has had the benefit of recent review by the Court of Appeal. In **Cable & Wireless Jamaica Limited (t/a LIME) v Digicel (Jamaica) Ltd (formerly Mossel Jamaica Limited) Unreported judgment dated 16th December 2009, SCCApp 148 of 2009, 196 of 2009,** Morrison JA (now President) stated:

> **"20. In Watersports Enterprises Ltd. V Jamaica Grande Limited, Grand Resort Limited and Urban Development Corporation (SCCA No 110/2008, Application No. 159/08, judgment delivered 4th February 2009) Harrison JA regarded it as a matter of "established principle" that a Stay should not be granted" unless the appellant can show that the appeal has some prospect of success" (paragraph 7). Therefore, the decision whether or not to grant a Stay is a discretionary one depending upon all the circumstances of the case," but the essential argument is whether there is a risk of injustice to one or other or both parties if (the court) grants or refuses a Stay (Paragraph 10)."**

Justice of Appeal Morrison also cited with approval the following passage in the judgment of Phillips LJ in **Combi (Singapore) Pte Limited v Ramneth Sriram and Sun Limited (FC2 97/6273/c unreported 23rd July 1997**:

> **"In my judgment the proper approach must be to make that order which best accords with the interest of justice. If there is risk that irremediable 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 necessarily 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 if there is a risk of harm to one party or another, which 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."

[7] It is clear that my first task is to consider whether there is merit in the appeal, that is, does the appeal have some real prospect of success. In this regard Mr. George urged that the Registrar's decision to issue the Writ of Seizure and Sale was erroneous on two grounds:

a) That an order for seizure and sale could not be issued because the rules precluded the issue of such an order unless it was associated with the enforcement of a money judgment.

b) The rules precluded the issue of an order for seizure and sale before the expiration of 14 days after service of the default costs certificate.

[8] The first ground is not one which I consider has much merit. The rules are to be construed in accordance with the overriding objectives. Those objectives are in no way advanced by a construction which bars enforcement by seizure and sale of a default costs certificate which is independent of a money judgment. The rule relied upon is CPR rule 46.4(1),

"A judgment creditor may recover on a writ of execution –

(a) The balance of any money judgment (including costs)

(b) Fixed costs in accordance with rule 65.3 and

(c) Interest on a money judgment"

It is apparent that the rule is indicating that a money judgment is to be seen as meaning a judgment for money as well as one for costs. "including Costs" is only decipherable on that basis, for otherwise it would mean a money judgment could not be enforced unless it included costs. The submission is in my view untenable. In addition Mr. Beswick helpfully referenced the decision of Sykes J (now the Chief Justice) in **Gordon Stewart v Noel Sloley et al [2016] JMSC Civ 50**, where he said at paragraph 104,

> **"It is important to recall that an Order for the payment of costs is a judgment debt within the meaning of Section 51 of the JSCA and therefore enforceable like any other money judgment (Branch *Development Ltd. v Bank of Nova Scotia [2014] JMSC Civ 40, 30-32* (McDonald Bishop JA)."**

[9] Mr. Beswick also referenced CPR rule 45.2, 64.2(3) 43.1 and 43.4. These all go to support the construction of 46.4(1) in the manner I indicated. For these reasons therefore, I do not regard Mr. George's first ground as having any real prospect of success.

[10] Mr. George's second ground of challenge to the decision of the Registrar is more promising. This is that the Order for Seizure and Sale ought not to be issued prior to the expiration of 14 days from the date of the Default Costs Certificate.

In this regard CPR Rule 65.12(b) states,

> **"A party must comply with an order for the payment of costs within 14 days of –**
>
> **(a) .....**

> **(b) if the amount of those costs (or part of them) is determined in accordance with rule 65.10 (basic costs) or rule 65.13 (taxation – general), the date of the certificate which states the amount"**

[11] Mr. George relied also on the fact that the Claimant, prior to obtaining the order for Seizure and Sale, wrote a letter to the Defendant stating inter alia,

> **"We wish to bring to your attention CPR65.12 which states that a party must comply with an order for the payment of costs within 14 days of the date of the certificate. Accordingly we provide our banking information herein to facilitate payment...." (Exhibit AS3)**

This letter dated 12th March 2018, suggests that the Claimant shared, or induced, the Defendant's understanding of the rule. It may also be argued that the letter encouraged the Defendant to think they had 14 days in which to pay.

[12] The Defendant's second ground therefore has some merit and a real prospect of success. Mr. Beswick argues that in any event no stay is to be granted due to the injustice which will or may result to his client. The litigation he says, has been marked by repeated failings on the part of the Defendants. His client has been unfairly kept away from the fruits of her judgment .She should therefore be allowed enjoyment of the benefit of the costs ordered. Mr. Beswick also makes the interesting point that there is in place an order of the Court of Appeal which will ensure that whatever the decision of the Court of Appeal his client will recover substantial costs. Therefore, even if this costs order is subsequently set aside, any amount received will be set off against those costs of the substantive appeal earlier adverted to. This consideration caused me some pause. I am after all required to consider all the circumstances when balancing the justice of the parties' situation.

[13] I do not however believe this latter consideration outweighs others. In the first place the costs order which the Claimant seeks to enforce totals $11,484,070. It

is with respect to a 2 day hearing in chambers in the Court of Appeal. It is not by any measure an insignificant amount. The Defendant has very good reason to be concerned that if paid out to the Claimant, and dissipated, the risk of recovery is small if the Defendant's appeal is successful. On the other hand the Defendant is a well known and established general insurance company. There is no evidence to support a submission that it will be unable to pay its costs, or the judgment, if either appeal is unsuccessful. Furthermore, if the bailiff were to complete execution irreparable damage may be caused to the Defendant in the way of its business. I say this because there is evidence that the bailiff attended the Defendant's operations and marked certain items such as computers. The effect on customers and potential customers of a bailiff proceeding to levy can have incalculable repercussions. Finally there is not much by way of evidence before me to assist in deciding or forming a view on what the Court of Appeal's ultimate order , or the Registrars assessment on taxation of costs, are likely to be. I am not a taxing master nor without submissions and evidence, do I intend to pretend to be. I therefore do not find that the stay should be refused by reason of the possible set off for costs in the substantive appeal.

[14] The conditions at paragraph 13 above, notwithstanding, I do believe that the Defendant ought to pay money into court as a condition of the grant of the Stay. An interim Order in that regard was already made on the 20th March 2018. In the unlikely event that the Defendant goes into receivership, or for some other reason is unable to pay these default costs, the condition that some amount be paid into court will ameliorate any consequential loss.

[15] I am therefore minded to order a stay of execution on condition that the Defendant pays into Court the amount of $1.6 million. This amount is not to be regarded as a pre-estimate of the costs ultimately to be assessed. Insofar as the costs, of this application for a stay, are concerned I believe they should abide the decision on the application to set aside the Registrar's Order for the issue of the Writ of Seizure and Sale.

[16] For the reasons stated above, I made the Orders outlined in paragraph 1 of this judgment.

David Batts
Puisne Judge