



[2022] JMSC Civ. 45

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013HCV03440

BETWEEN	THE ASSETS RECOVERY AGENCY	CLAIMANT
AND	ANDREW HAMILTON	1ST DEFENDANT
AND	DOROTHY HAMILTON	2ND DEFENDANT
AND	ANDRE HAMILTON	3RD DEFENDANT
AND	ANDREW HAMILTON CONSTRUCTION LIMITED	4TH DEFENDANT
AND	ANDREHAN SEAFOODS LIMITED	5TH DEFENDANT
AND	DEVON CLEARY	6TH DEFENDANT
AND	JANET RAMSAY	7TH DEFENDANT
AND	PAULETTE HIGGINS	8TH DEFENDANT
AND	ADMINISTRATOR-GENERAL FOR JAMAICA (as Administrator Ad Litem, Estate ANNMARIE CLEARY, deceased)	9TH DEFENDANT

IN CHAMBERS

Mrs. Caroline P. Hay Q.C. and Ms. Zurie Johnson instructed by Caroline P. Hay, Attorneys-at-law for the Claimant

Mr. Ian Wilkinson Q.C. and Mr. Lenroy Stewart instructed by Wilkinson Law, Attorneys-at-law for the 1st, 2nd, 3rd, 4th, 5th, 7th and 8th Defendants

Ms. Geraldine Bradford instructed by the Administrator General's Department for the 9th Defendant

March 1, and April 20, 2022

APPLICATION FOR A STAY OF PROCEEDINGS- SECTIONS 27, 48(E) AND 48(G) OF THE JUDICATURE (SUPREME COURT) ACT- RULE 26.1 (2) (E) OF THE CIVIL PROCEDURE RULES, 2002 –APPLICATION PURSUANT TO SECTION 57 OF THE PROCEEDS OF CRIME ACT

STEPHANE JACKSON-HAISLEY J

BACKGROUND

[1] The Application here is for a stay of proceedings. For the purpose of this application it is not necessary to delve into the facts of this case or the details concerning the substantive matter. Suffice it to say that the substantive matter is brought by the Assets Recovery Agency (ARA), the Claimant herein pursuant to section 57 of the Proceeds of Crime Act, 2007 (POCA) against the Defendants and seeks civil recovery orders in relation to their assets. That application was filed on June 6, 2013 followed by an Amended Claim Form and Particulars of Claim filed on June 25, 2013. On the date of the hearing on July 9, 2013 a preliminary point was taken challenging the legal status of the Claimant to commence the proceedings. This was heard by Sykes J (as he then was) and the application was dismissed on July 31, 2013. There was an appeal which was also dismissed on December 20, 2017.

[2] To date there has been no hearing in the substantive matter. On November 23, 2020 the Claimant herein filed a Notice of Application for Judgment to be entered. It is that application that the 1st, 2nd, 3rd, 4th, 7th and 8th Defendants (hereafter the Defendants) seek to have stayed.

[3] Their application is made pursuant to a Notice of Application for Court Orders for a Stay of Proceedings filed on March 10, 2021 in which the main orders sought are:

- That there be a stay of these substantive proceedings until the further Order of this Honourable Court;
- That the Claimant's Application for Judgment dated the 16th November, 2020 and filed herein on the 23rd November, 2020 be adjourned sine die pending the further Order of this Honourable Court;

- Leave to appeal be granted, if necessary.

[4] A total of fourteen grounds have been listed, the majority of the stated grounds seem to be a chronology of events leading up to the decision of the Court of Appeal in **Paul Chen Yong et al v Eagle Merchant Bank Jamaica Ltd and anor** [2018] JMCA App 7 and so provide some useful background information. I have listed them below:

1. The instant Claim was filed on June 6, 2013 and on June 7, 2013 the Honourable Mr. Justice Sykes (as the then was) granted a restraint order on an Ex parte application from the Claimant which was later extended by this Honourable Court.
2. At all material times, the 1st, 2nd, 3rd, 4th, 7th and 8th Defendants (hereafter referred to as “the Defendants”) participated in the proceedings by, *inter alia* filing an acknowledgement of service, seeking to discharge the restraint order and seeking to strike out the claim in both the Supreme Court and the Court of Appeal;
3. Additionally, a point in limine/preliminary point was taken on behalf of the Defendants on July 9, 2013 challenging, inter alia, the legal status of the Claimant, to institute the instant claim against the Defendants. This application was dismissed by Mr. Justice Bryan Sykes on July 31, 2013.
4. The Defendants appealed Mr Justice Syke’s decision and this appeal was heard by the Court of Appeal on February 25 and 26, 2015 and March 5, 2015. The Court of Appeal reserved its judgment and eventually dismissed the said appeal on December 20, 2017;
5. An application for leave to appeal to the Privy Council challenging the Court of Appeal’s dismissal of the said appeal, was filed in the Court of Appeal in January, 2018;
6. While the application for leave to appeal to the Privy Council was, and still is pending the Defendants discovered that one of the Judges who heard the said appeal had reached the mandatory age of retirement without receiving the necessary permission from His Excellency the Governor General to continue as a Court of Appeal Judge prior to the delivery of the Court of Appeal’s Judgment dismissing the appeal. Consequently, this Judge has no legal authority to contribute to, decide, or promulgate the said Judgment of the Court of Appeal;
7. The Defendants filed an application in the Court of Appeal (COA 2019 Motion 00017) to set aside the said Judgment of the Court of appeal. This

motion/application is pending and has a real prospect of success having regard to the said Court of Appeal's decision in Paul Chen-Young et al v Eagle Merchant Bank Jamaica Ltd and anor [2018] JMCA App 7.

8. Depending on the Court of Appeal's ruling in relation to the said pending motion, the Defendant's original challenge to the Claimant's legal status, or lack thereof, is still very much "alive".
9. If the Defendants' said application challenging the Claimant's legal status were to succeed the instant claim and subsequent proceedings would be void ab initio and this claim would be terminated in favour of the Defendants;
10. If this Honourable Court were to hear the Claimant's said application to enter Judgment before the Court of Appeal rules on the pending application this will be highly prejudicial to the Defendants, and might result in a gross miscarriage of justice, particularly if as expected the Court of Appeal were to rule subsequently in favour of the Defendants;
11. It is, therefore in the interest of justice that the instant claim and all subsequent proceedings are stayed or adjourned until the determination the said application (COA 2019 Motion 00017) in the Court of Appeal;
12. The Claimant will not be prejudiced if a stay is granted, or if an adjournment sine die is granted, as a receiver has been appointed by this Honourable Court who is tasked with managing and preserving the assets that have been restrained;
13. Pursuant to rule 26.1(2)(e) of the Civil Procedure Rules, the Court can stay the whole or part of any proceedings generally or to a specified date or event; and
14. Pursuant to its inherent jurisdiction the Court can stay proceedings or adjourn the proceeding generally or to a specified date or event.

[5] In support of their Application the Defendants rely on the Affidavit of 7th Defendant who deponed on behalf of the others. She avers that the Defendants have good reason for not filing a Defence, which includes the fact that they have challenged the legal personality of the Claimant to commence these proceedings or any legal proceedings at all. Despite that they have participated actively in these proceedings.

[6] She states that there are connected or related matters involving the Claimant and several of the Defendants. She is aware that a Notice of Motion was filed by their Attorneys-at-law on 23rd October 2019 seeking to set aside the Court of Appeal's

decision relating to the legal personality of the Claimant and she verily believes that the Notice of Motion has a realistic prospect of success. It came up for hearing on January 20, 2020 and on that date the Court requested that the Attorney-General's input be sought. Subsequently, on the advice of the Registrar a re-listed Notice of Motion was filed on June 23, 2020 and they are now waiting on the Court of Appeal to set a date for hearing. She is of the view that covid-19 has been the cause of the delay in the re-scheduling of the hearing of the matter. They have written to the Court of Appeal to ascertain when a new date will be set and they are now awaiting a response.

[7] She is also aware that her Attorneys-at-law have filed a Notice of Motion for Leave to Appeal to the Privy Council and that has been adjourned pending the hearing of the other Notice of Motion. She is of the view that the Court of Appeal's decision dismissing the legal challenge to the legal personality or status of the Claimant is likely to be set aside in which case the challenge to Chief Justice Syke's decision would have to be heard again.

[8] On behalf of the Claimant, reliance was placed on the affidavit of Courtney Smith in his capacity as Director of Legal Services of the Financial Investigations Division (FID). Having seen the application for a stay of proceedings, he is of the view that it is not brought in good faith and that it is calculated to further delay the outcome of the matter in circumstances where the Applicants have filed no defence whatsoever to the claim and where all their legal challenges on every single issue raised to date have failed.

[9] He also says that the further delay will continue to cause tremendous hardship and expense as an interim receiver was appointed in these proceedings and that receiver is paid from the assets under management, primarily an account which holds net sale proceeds of an asset under restraint. To date, the bulk of the funds on account have been depleted with at least a quarter of the funds going to Messrs. Wilkinson Law, Attorneys-at-Law as fees and costs. The remaining has been substantially depleted by the Interim Receiver's fees.

SUBMISSIONS

[10] In the submissions, counsel on behalf of the Defendants advanced that the Court has the power to grant a stay of proceedings based on the provisions of section 48 of the Judicature (Supreme Court) Act and also Rule 26.1(2)(e) of the Civil Procedure Rules (CPR).

[11] He submitted that both matters before the Court of Appeal will have a direct effect on the Supreme Court proceedings in particular as they relate to the status of the Claimant before this Court. The first matter is that Sykes J (as he then was) had ruled against the preliminary point. The matter went on appeal and the Court of Appeal upheld his ruling. An application was filed for leave to appeal to Her Majesty in Council and that application was not heard and is still pending before the Court of Appeal. If that application had proceeded, there is a possibility that the Judicial Committee of the Privy Council could rule in favour of the Defendants and reverse the Court of Appeal's decision.

[12] Counsel submitted that both the Defendants' Motion have a real prospect of success on appeal and that this court should not allow the Claimant to proceed with its application for Judgment in the totality of the circumstances. This would potentially, render the Defendants' application in the Court of Appeal nugatory. Moreover, if the Court of Appeal rules in the Defendants' favour then the Defendants' original challenge to the Claimant's legal status or lack thereof, is still very much alive and will have to be re-heard by the Court of Appeal. Even if the Court of Appeal disagrees and dismisses the Motion that is not the end of the matter as this would entitle the Claimants to try to seek Judgment because the Defendants' other motion for leave to appeal to the Privy Council would then have to be heard.

[13] He pointed out that the hearing of the application relying on the Court of Appeal decision of **Paul Chen v Eagle Merchant Bank and Anor** is still pending and that it came up before the court approximately two years ago but their Lordships wanted the Attorney General's department to express an opinion on the issues before the Court. They have since been trying to persuade the Registrar to have it listed for more than a

year. However, there is no date as to when that will be dealt with and that is why they ask for this matter to be adjourned sine die.

[14] Queens Counsel further contended that if the Court of Appeal were to hear the matter of the application to reverse its judgement because of the status of one judge, then the issue of the Claimant's status would remain an extremely live one. If the Court of Appeal were to reverse its decision, then it means the matter would have to be heard before a newly constituted Court of Appeal panel.

[15] There is also an important additional point which Queens Counsel asked the Court to take into consideration which is that the Defendants have also filed an application for the provision of legal fees so that they can continue to be represented. This is supported by two affidavits plus an affidavit of urgency. That has not been heard as yet. There are serious constitutional issues affecting the representation of the parties so until that is heard, the matter herein should not proceed.

[16] In response to the Claimant's averment that they have filed no Defence, he asked the Court to be reminded that the Defendants' challenge to the legal personality of the Claimant goes to the heart of the Claimant having no locus standi to bring the instant claim. Additionally, the Claimant is estopped from seeking judgment at this time having regard to the length of time that has passed since the filing of the claim. If the Court were to hear or to grant the application to enter judgment this will be highly prejudicial to the Defendants while on the other hand the Claimant has not demonstrated any prejudice.

[17] Queens Counsel on behalf of the Claimant objected to the grant of a stay of proceedings on the basis that the relief of a stay does not further the overriding objective of the CPR nor does it deal with the case before the Court justly and that it would create great prejudice to the position of the ARA.

[18] Further, the failure to put forward a Defence suggests that there is none and that the challenge to their status was exhaustively dealt with by Sykes J. Even if the Court of

Appeal decision suffered from the technical incapacity of the retired Judge, it would simply mean that the Sykes J's reasoned dismissal of the point is the standing position

[19] In reliance on the affidavit of Courtney Smith she pointed out that there has been in place an interim receiver and the starting balance in the account was Eighty-Two Million, Six Hundred and Fifty-Nine Thousand Eight Hundred and Fifty Dollars (\$82,659,850.00) and as at March 2021 it was at Eighteen Million, Six Thousand Seven Hundred and Six Dollars and Eighty-Four Cents (\$18,006,706.84). The effect of what is being sought will exhaust the estate currently under restraint at least in terms of liquidity. She further contended that the Court's approach should be towards preservation of the estate. The longer this goes on the more prejudice will be suffered by the Claimant while on the other hand the Defendants have not demonstrated any prejudice to them.

[20] Queens Counsel further submitted that there has been no visible or real effort to urge any appeal and that the delay on the part of the Defendants should not be rewarded with a stay in the circumstances of this case. From the time the decision was handed down in 2018 there was no movement by way of demonstrable effort or reasonable effort to prosecute the appeal until 2019, when the ARA indicated that they were minded to file this application to enter judgment.

[21] She advanced that the delay is important to the chronology but relevant to the point made in respect of their application for the provision of legal expenses. She contended that a stay of proceedings is an extremely impactful interference with a litigant's right to have a matter adjudicated upon and so should be sparingly used. In such an application the Court is asked to balance the competing rights and interest of the parties. The very fact that there is no date for the hearing of the matters in the Court of Appeal is by itself telling and effectively, this Court would be railroading a claim filed about nine years ago for a potential litigation which has no date. She also advanced that there is no reason to say that the appeals have any reasonable prospect of success.

ISSUE

The sole issue is whether or not to grant a stay of proceedings

DECISION

[22] The power to grant a stay of proceedings is derived from the inherent jurisdiction of the Supreme Court and is preserved in the provisions of Section 48(e) of the Judicature Supreme Court Act which makes provisions for the Court to act as follows:

‘to direct a stay of proceedings in any cause or matter pending before it if it think fit, and provides that any person shall be at liberty to apply to the said Court, by motion in a summary way, for a stay of proceeding, either generally or so far as may be necessary for the purposes of justice, and the Court shall thereupon make such order as is just. Rule 26.1(2)(e) of the Civil Procedure Rules refers to the Court’s power to stay the whole or part of any proceedings or either generally or until a specified date or event as a part of its general case management powers’.

[23] The test for the grant of a stay of proceedings is reflected in a number of judicial pronouncements. One case which highlights the general principles pertinent to the grant of a stay is the case of **Omar Guyah v Commissioner of Customs and Attorney General of Jamaica and Audrey E Carter** [2015] JMCA Civ 16. Although the main issue raised in that case was whether to grant a stay in civil proceedings where there are parallel criminal proceedings the principles enunciated offer some guidance for this court in determining whether or not to grant a stay.

[24] After highlighting that there is no automatic bar to the conduct of concurrent civil and criminal proceedings arising from the same facts McDonald-Bishop JA (Ag) (as she then was) set out some considerations which this Court finds instructive. At paragraphs 32 she states as follows:

‘[32] ...The court has the discretion to stay the civil proceedings until determination of the criminal proceedings but such discretion must be exercised in accordance with the established legal principles. Those core principles are that the civil action ought not to be stayed unless the court is of the opinion that justice between the parties so requires, that is to say, where there is a real as opposed to a notional risk of serious prejudice which may lead to an injustice or a serious miscarriage of justice in the criminal proceedings.’

She continued at paragraph 36:

“[36] It means, then, that the onus was on them to demonstrate to the learned judge how they would have been prejudiced so as to suffer grave injustice or a serious miscarriage of justice in the criminal proceedings, if the appellant’s ordinary right to have his claim tried is not stymied. In order to discharge that burden, they were obliged to place before the court sufficient material to satisfy the learned judge that there was a real risk of prejudice that might lead to an injustice to them in the criminal proceedings if the civil case was not stayed.”

With respect to the issue of inconsistent decisions the Court had this to say at paragraph 40:

“...In my respectful view, the consideration of the learned judge as to the existence of parallel proceedings and the likelihood of inconsistent decisions ought not to have been the determinative or the pivotal considerations although they would have been relevant ones.”

On the question of delay, the following extract is useful which can be found at paragraph 46:

“...It could not be just and convenient to stay the bona fide claim of a party who has the right to bring his claim until the determination of criminal proceedings when there is clear tardiness in pursuing those proceedings and the trial of the matter is nowhere in sight. An open-ended stay in the face of such marked delay could well be prejudicial so as to lead to an injustice to the appellant in pursuing his claim in the civil proceedings. The risk of injustice to the claimant in the civil proceedings is a relevant consideration in assessing the competing interests. So, there may well be cases in which the question of delay may assume prime significance in considering whether civil proceedings should be stayed to allow criminal proceedings to proceed. This, in my view, is one such case.”

McDonald-Bishop JA (Ag) in considering the effect of a stay referred to a passage from the Halsbury’s Law of England which is set out below:

“[51] In Halsbury’s Laws of England, Volume 37, 4th Edition, at paragraph 442, it is stated: “The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case and therefore the court’s general practice is that a stay of proceedings should not be imposed unless

the proceedings, beyond all reasonable doubt, ought not to be allowed to continue.”

[25] The **Omar Guyah** case also featured an application of the core principle extracted from the Privy Council decision of **Donald Panton and Others v Financial Institutions Services Limited** [2003] UKPC 86 which can be read at paragraph 11 of the judgment as follows:

“Both courts began with the need to balance justice between the parties. The plaintiff had the right to have its civil claim decided. It was for the defendants to show why that right should be delayed. They had to point to a real and not merely a notional risk of injustice. A stay would not be granted simply to serve the tactical advantages that the defendants might want to retain in the criminal proceedings. The accused’s right to silence in criminal proceedings was a factor to be considered, but that right did not extend to give a defendant as a matter of right the same protection in contemporaneous civil proceedings. What had to be shown was the causing of unjust prejudice by the continuance of the civil proceedings.”

[26] The principles set out in these two cases can be applied in the instant case with some adjustment and allowance for the fact that in the instant case there is no concurrent criminal proceedings, but rather what exists is the filing of two Notices of Motion in the Court of Appeal in respect of the same matter.

[27] The overarching principles that can be extracted from these cases is that the Court has a discretion whether or not to grant a stay and that the main consideration is what is required to do justice between the parties. At the core of these principles and the undertone of the **Omar Guyah** judgment is the fact that the remedy of a stay should be used sparingly as it operates as a serious and grave interruption in the proceedings. In determining what is just, the Court is required to balance the competing interest of the parties and in considering the justice of the case, the Court should consider any likely prejudice that would be occasioned to either party.

[28] It is the party who is seeking the stay who must show how he would be prejudiced if the stay is not granted. The onus is on him to demonstrate how he would be prejudiced so as to suffer grave injustice or a serious miscarriage of justice in the other proceedings. In order to discharge this burden, he is obliged to place before the

Court sufficient material to satisfy the Court that there is a real risk of prejudice that might lead to an injustice if this application is not stayed.

[29] The Defendants herein have suggested that if the Court were to hear the Claimant's application to enter Judgment before the Court of Appeal decides on the pending applications this will be highly prejudicial to them and might result in a gross miscarriage of justice, particularly if as expected the Court of Appeal were to rule in their favour. They have contended that it would render any decision by this Court as nugatory.

[30] Although the Defendants have said a decision adverse to them will be highly prejudicial to them this has to be balanced with any likely prejudice to the Claimant. The most obvious prejudice to the Defendants, in the event they do not succeed at the hearing, would no doubt be the seizure of the assets which are the subject of the application. It is of note that no Defence has been filed by the Defendants as they rest on the fact of the Claimant having no locus standi to bring this case. The current decision on that issue is that of Sykes J who decided that they do have such locus standi, a decision which is currently upheld by the Court of Appeal so until there is a decision reversing this, the Court has to be guided by this decision.

[31] The Defendants have had the benefit of a first instance decision on their preliminary point although not in their favour. This is more than can be said for the Claimant herein. The Claimant herein having filed their application almost nine years ago are yet to obtain a decision at first instance in respect of what they are seeking.

[32] In any event, if there is a decision adverse to the Defendants they have as always the right to appeal it. If they were to do so, then they would have all their matters in the same forum and can have them ventilated there.

[33] Additionally, as it relates to the question of prejudice the issue raised by Mr Courtney Smith relative to the dissipation of some of the assets is a very live concern as in the event of a decision in their favour, the delay may result in the disposition of more assets which may result in a frustration of part of the judgment.

[34] In these circumstances, the Defendants have failed to present sufficient material before the Court to demonstrate that the prejudice to them will be any greater than the prejudice that will be occasioned to the Claimant if there is no stay. On the other hand, the Claimant having filed their case in 2013 are yet to secure a resolution even at first instance. A Claimant in a civil matter has a right to a decision within a reasonable period of time. The Defendants' suggestion the matter should be adjourned sine die defies the very notion of timely justice and is an affront to the thrust of dealing with cases expeditiously.

[35] Although the Defendants filed their matter in the Court of Appeal some two years ago, they are still unable to give a timeline as to when the matters in the Court of Appeal will be heard because there is no date set. The Defendants have not provided sufficient evidence to demonstrate any vigorous pursuit on their part to have their matters heard in the Court of Appeal. It is of note that several of the steps they took were taken only after an indication by the Claimant of their intention to apply for Judgment to be entered. In light of the matter being on the Court list for such a long period of time without any certainty as to if and when the matter is to be heard in the Court of Appeal, then any stay in these proceedings would be an open ended one. The fact of an open ended stay was frowned upon in the **Omar Guyah** case especially 'in the face of such marked delay', which the Court of Appeal was of the view would be prejudicial so as to lead to an injustice in pursuit of the claim in the civil proceedings. (See paragraph 46).

[36] The issue of delay is a very live one in this case. Delay in and of itself can have certain deleterious effect on the availability of witnesses and the ability of a party to present its best case to the Court. The reasons for the delay could not be laid at the feet of the Claimants, in fact it seems to me that most of the delay has been occasioned by the actions of the Defendants.

[37] There is no danger here of any inconsistent decisions and even if that were so the **Omar Guyah** case is clear that this should not be determinative of the issue. The principles regarding inconsistent decisions as enunciated in the **Omar Guyah** case are even more compelling here because we are dealing with decisions that would be made

at different levels of Court and so any decision of the Court of Appeal different from that in the Supreme Court would simply have the effect of overturning the decision of the Supreme Court and so the question of inconsistent decisions would not arise.

[38] The issue regarding the application for the provision of legal fees is a separate and distinct one. It is not one of the grounds filed in support of this application. Counsel has sought here to add it as a ground and has submitted that it may impact the Defendants' constitutional right to legal representation. If this is an issue requiring the court to consider a constitutional breach this is not the proper way in which to bring such a matter. It is an application in and of itself and should be treated with separately. To seek to advance it as a ground without more is not allowed at this point.

[39] One ought never to lose sight of the overriding objective of the CPR as set out in Rule 1.1 which is to deal with case justly which includes dealing with cases expeditiously. It is plain to see that in these circumstances to allow a stay would not further the overriding objective of the CPR as it would result in further and indefinite delay. Under these circumstances the application for a stay of proceedings is denied. My orders are as follows:

1. The Defendants' application for a stay of proceedings is denied.
2. The Claimant's Application for Judgment is to proceed forthwith.

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S. Jackson-Haisley
Puisne Judge