SUPREME COURT LIBRARY
KINGSTON
JAMAICA
Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO C.L. W 186 of 1995

BETWEEN	WILBERT WALKER	CLAIMANT
A N D	THE JAMAICA PUBLIC SERVICE COMPANY LIMITED	1st DEFENDANT
AND	MR. DIXON	2ND DEFENDANT
AND	R.O. WALTERS AND ASSOCIATES LIMITED	3rd DEFENDANT

Mr. C. Samuda, instructed by Piper & Samuda for 1st Defendant/Applicant
Mr. Norman Samuels for Claimant/Respondent

Heard July 30, August 10 and 18, 2004

ANDERSON J:

On the 16th September 1993, the Plaintiff was a maintenance linesman employed to the 3rd Defendant, a sub-contractor to the 1st Defendant, when he suffered severe injuries from electrical shocks while working on a pole carrying high-tension electric wires. The second defendant is alleged to have been the agent or servant of the 1st defendant and was according to the evidence, the person in charge of the operation for the 1st defendant. The plaintiff sued all three (3) persons. On March 2, 2004 after hearings lasting several days spread over the period July 2001 to that date, Her Ladyship Marva McIntosh J. handed down her judgment. She found in favour of the Plaintiff and against the 1st and 2nd defendants and awarded costs to be agreed or taxed against them. She also found in favour of the 3rd defendants as against the 1st and 2nd defendants and again she awarded costs to be agreed or taxed against the 1st and 2nd defendants. Execution of the judgment was stayed for 14 days on the application of the 1st defendant.

An application for an interim payment was made before Jones: J, on the 7th July 2004 but was refused. The plaintiff, in seeking to enforce his judgment, sought and obtained an Order for seizure and sale of the goods of the 1st defendant, and the Writ was delivered to the bailiff of the Resident Magistrate's Court for Kingston for execution. On the 9th July the 1st defendant sought and obtained before Straw: J, (Ag.) an order staying execution of the Writ by the bailiff for a period of twenty-one (21) days from the date of the order.

The application was made *ex parte* and the learned Judge adjourned the matter for full hearing on July 30th and also ordered that the claimant must be served with notice. Also on the 12th July the 1st defendant filed a notice of application for court orders in which it sought a stay of execution of all proceedings pursuant to the judgment of the Hon. Mrs. Justice Marva McIntosh until the hearing and conclusion of the appeal.

When the parties appeared before me on the 30th July 2004, counsel for the 1st defendant in arguing in support of the application submitted that the stay should be granted for there was considerable merit in the appeal which had been filed against the decision of McIntosh J. In that regard, he referred *in extensu,* to his notice and grounds of appeal against the judgment of the learned trial judge, as well as the submissions which had been made before her at trial. He also submitted that the affidavit evidence of the plaintiff himself indicated that if the judgment were paid and the appeal was successful, the plaintiff would be unable to repay the proceeds of the judgment which would have been paid over to him. Thirdly it was submitted that there was evidence that the appeal would be heard during the upcoming Michaelmas term and accordingly extensive delay would seem to be unlikely. Fourthly, it was submitted that the affidavit evidence on behalf of the plaintiff did not disclose any basis in law which ought to cause the court to exercise its discretion to refuse of application. This I consider a strange submission, inasmuch as it seems to suggest that it is for the Respondent to the application to show why the stay *should not* be granted, rather than for the applicant to show why it should be. In any event, he submitted, there was no evidence of prejudice which the plaintiff would suffer as monies had been placed in escrow. It may be observed that the lack of prejudice here would perforce refer to the certainty of payment, rather than its timelessness, which may of course give rise to prejudice. He was also constrained to point out that the order for seizure and sale was only sought when the application for interim payment had been refused, and despite what he claimed was an agreement for the escrowing of funds.
He accordingly prayed that the application should be granted since;

(i) There was merit on the appeal;

(ii) There was no available evidence on behalf of the plaintiff that the appeal was without merit and would fail;

(iii) That the judgment of the learned trial judge could not be supported in its findings of fact or law and was devoid of analysis to support the level of awards for damages given.

In response, Mr. Samuels for the plaintiff submitted that there is a final judgment in favour of the plaintiff and that as of today, Straw J's stay for twenty-one (21) days having expired, the plaintiff was fully entitled to enforce his judgment and claim the full amount awarded by the Trial Court. He submitted that the CPR clearly states that the filing of an appeal does not give an automatic stay of execution of the judgment (See CPR 60.3) The fact of the appeal therefore should not without more, lead the court to grant a stay.
Mr. Samuels observed that on the 8th July 2004, the plaintiff had secured an Order for the seizure and sale of the first defendant's property and the Writ had thereafter been delivered to the Bailiff for execution. He noted that as a result of the issue of the writ, the 1st defendant had sought by way of an *ex parte* application, a stay of execution of the writ. He wondered whether such an application was allowable under the CPR and cited Rule 46.88, which is in the following terms.

> The judgment creditor may ask the bailiff to suspend execution.

He suggested that the proper inference to be drawn from the wording of the rule was that *only* the judgment creditor could ask for suspension of the execution of the writ. He further cited Rule 47 of the CPR dealing with the procedure that in his view needed to be followed if such an application were to be made. The relevant part of the rule provides:

> Rule 47.1 This Part deals with
> (a)
> (b) suspension of orders for the seizure and sale of goods and orders of delivery of possession.

Rule 47.3 which deals with the procedure to be followed in matters to which this Part relates, is as follows:

1) The judgment debtor must serve the application to vary or suspend on the judgment creditor.
2) The judgment creditor may file and serve on the judgment debtor, objections to the application.

3) Where the judgment creditor does not do so before the end of 14 days from the date of the service of the application, the court may make an order in the terms for which the judgment debtor asks.

Counsel submitted that until the procedure set out in CPR 47.3 is followed, and in his view, it had not been followed here, the applicant is not entitled to any order to suspend the execution of the Writ. Further, if the application were to succeed, it would render nugatory the Order for seizure and sale granted on July 8, 2004.

He also rejected any knowledge of the establishment of an escrow account from which the plaintiff could benefit. He had not been a part of any establishment of such an account. The plaintiff presently has a right to have the Writ executed in order to satisfy his judgment. The order to stay execution had not been obtained in accordance with the provisions of the Rule 47 of the Civil Procedure Rules.

With respect to the question of the likelihood of the defendant's appeal succeeding, he submitted that given the nature of the pleadings and the evidence and the findings of the Court at the trial, it was unlikely that the appeal would succeed in its entirety. Thus, if the plaintiff is to be denied the fruits of his judgment, the court ought to consider the justice of the case including the possibility of ordering an interim payment which the rules provide may be made at any time after the filing of the defence.

He also submitted that the Court ought not to concern itself with whether, if the appeal were successful, the plaintiff would be able to repay the judgment debt. Finally, he submitted that the stay granted for twenty-one (21) days and extended to August 10, 2004 is either spent or should be dissolved so that the plaintiff could enforce the order for seizure and sale.

Mr. Samuda, responding to Mr. Samuels' submissions, submitted that notwithstanding what was set out in Rules 46 and 47 of the CPR, it should not be doubted that the court had an inherent jurisdiction to stay an Order that it had made. Nor do the rules preclude an *ex parte* application where there is a need for urgent relief. He pointed out that what was now before the court was *not* an application to extend Straw J's order of July 8, but

rather, purely and simply, an interlocutory application seeking a stay of execution of the judgment (effectively baring execution of the Writ of Seizure and Sale) pending the hearing of the appeal.

At the end of the submissions, I indicated that I would hand down my ruling within a few days and Mr. Samuels for the plaintiff gave an undertaking not to proceed to execute the Writ of Seizure and Sale.

The Issue

The issue to be determined here is whether the first defendant may, and should be allowed a stay of execution of the judgment until the hearing of the appeal, and if so, what ought to inform that decision.

Dealing with the Procedural Issue

In so far as Mr. Samuels's submissions on the alleged procedural deficiencies of the order obtained on July 8, I would essay the following. I would hold that by ordering the twenty-one day stay as well as ordering the service of the notice of the application on the plaintiff, and this having been done, the issue was now properly before me, and any procedural defect was cured. The issue of the right to a stay in circumstances where an appeal has been filed is therefore properly before me.

The Ruling of the Court – Does the Court have a right to grant a stay?

The proposition that lodging an appeal does not give rise to an automatic stay of execution of the judgment is trite law and is stated in CPR 60.3. It is also trite law that a successful litigant is entitled to the fruits of his judgment.

Halsbury's Laws of England 4th Edition, Volume 17 and paragraph 455 states the following proposition, which I adopt.

> The court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will as a rule, only grant a stay if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.

In this regard, I would like to cite a section from the judgment of Kabui J., in **Shell Company (Pacific Islands) Limited v Wayne Frederick Morris and Benjamin St.**

Giles Prince (As Trustees) [2003] (Civil Appeal 005 of 2003)a case from the Court of Appeal of the Solomon Islands, which articulates the "balancing-of-principles exercise" which the court must undertake. I found the reasoning of the judge very helpful, and I respectfully adopt it.

> I start with the undisputed position that the Court does have an unfettered discretion to grant a stay or not to do so. (See **Attorney-General v. Emersion (1890) 24 QBD 56**). I also restate the principle that a judgment creditor is entitled to reap the fruits of his judgment. (See **The Annot Lyle [1886] 11 P.D 114**). As against that principle is the contrary principle that the Court may order a stay where refusing to do so would render the appeal nugatory (pointless). So, there has to be a balance between the rights of the judgment creditor and the rights of the judgment debtor. The scale is likely to tip in favour of the judgment debtor if he can prove special circumstances in his favour. A case of special or exceptional circumstances would be where serious injury would be done to the judgment debtor if execution takes place pending an appeal especially where the appeal has got merits to it. Counsel for the Respondents, Mr. Sullivan, cited two instances showing serious injury arising in this regard. The first is where execution would ruin the judgment debtor beyond simply causing hardship. He cited **Linotype-Hell Finance Ltd. v. Baker** [1993] 1 W.L.R. 321 for that proposition.

The need for "special circumstances" and the imperative of balancing of competing principles in the exercise of discretion was also canvassed in **Winchester Cigarette Machinery Ltd v Payne & Anr (No 2) The Times Law Reports December 15, 1993,** where Hobhouse L.J. said that 'the appellant had to show some special circumstances which took the case out of the ordinary'. Again, in that same case, while Gibson LJ expressed the view that "the court had moved on from the principle that the only ground for a stay was the reasonable probability that damages and costs paid would not be repaid if the appeal succeeded", he opined that: "... full and proper weight had to be given by the court to *the starting principle that there had to be a good reason for depriving a plaintiff from obtaining the fruits of a judgment*." (Emphasis Mine)

The case of **Linotype-Hell Finance Limited v Baker [1992] 4 All E.R. 887** is now widely regarded as enunciating the modern approach to be adopted in considering such an application. Before Linotype, the better view was that the only "serious injury" which would allow the court to exercise its discretion in favour of granting a stay of execution

pending an appeal was the likelihood that if the appeal were successful, the victory would be Pyrrhic and rendered nugatory because of the inability of the litigant who had received his award to repay the sums so received. Linotype-Hell made it clear that where execution would ruin the debtor, this would be sufficiently "serious injury" to allow for the court to grant a stay. In that case the learned Staughton L.J. had this to say.

> In the Supreme Court Practice 1991 Volume 1, there are a large number of cases cited as to when there should be a stay of execution pending an appeal. At a brief glance they do not seem to me to reflect the current practice in this court; and I would have thought it was much to be desired that all the nineteenth century cases should be put on one side and that one should concentrate on the current practice. It seems to me 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 prospect of success, that is legitimate ground for granting a stay of execution. The passage cited in The Supreme Court Practice from **Atkins v Great Western Rly Co [1886] 2 TLR 400,** "As a general rule the only ground for a stay of execution is an affidavit showing that if the damages and costs are paid there is no reasonable probability of getting them back if the appeal succeeds" seems to be far too stringent a test.

The effect of Linotype was to define further special circumstances and to expand the previously narrow confines within which such were to be viewed. Thus for example, in **Alexander v Cambridge Credit Corporation Limited and Another [1985] 2 NSWLR 684**, a decision of he New South Wales Court of Appeal, the court had said:

> In our opinion, it is not necessary for the grant of a stay that special or exceptional circumstances should be made out. It is sufficient that the applicant for the stay demonstrates a reason or an appropriate case to warrant the exercise of discretion in his favour.

It would appear that this conclusion is clearly wrong in light of the decision in Linotype.

In the instant case, Mr. Samuda for the applicant has focussed on the perceived merits of the appeal and its likelihood of success as well as the inference to be reasonably drawn from the Respondent's own affidavit, that he is impecunious and may therefore be unable to repay the damages if the appeal were successful. I agree that both these matters are properly within the purview of the court. I also believe that within this context, the court is well advised to consider the likelihood of the appeal succeeding, this of course, without seeking to pre-judge matters which are for the Court of Appeal. But it would seem to follow that the stronger the appeal appears, the greater the weight to be attached to the lack of means of the plaintiff. Certainly, there has been no submission that satisfying the

judgment would "ruin" the 1st defendant, and there is no affidavit on behalf of the second appellant/2nd Defendant himself claiming this possibility.

In looking at the Applicants' Notice of Appeal, it may be relevant to note that the matters purportedly appealed against are, general damages, special damages, loss of future earnings and costs awarded to the successful plaintiff and third defendant. The main area of challenge seems to be with the quantum awarded by the judge and the issue of whether there was any proper analysis of the cases cited in submissions, to support those awards. Although the notice does say it is challenging certain findings of fact of the learned trial judge, it does not, in terms, challenge the finding that the 1st defendant was liable. It would appear that it may be possible to uphold some of the challenges without necessarily concluding that the judge's finding of liability was wrong. If that view is correct, then this court would be entitled to consider its proposed ruling in the context of the possibility that while the damages may be reduced, the liability may be upheld. I believe that this would not be unreasonable to arrive at such a conclusion.

If I am correct in this regard, then it seems that the exercise of the discretion that the court undoubtedly has, must be done within the context of the over-riding objective of the Civil Procedure Rules 2002; that is, to act justly. I would wish to repeat here the passage cited from Halsbury's above:

> The court has an absolute and unfettered discretion as to the granting or refusing of a stay, *and as to the terms upon which it will grant it*, and will as a rule, only grant a stay if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing. (Emphasis mine)

The plaintiff is a relatively young man with a wife and children to support. Because of his injuries incurred in the accident in 1993, he has suffered loss and damage and has been unable to hold gainful employment since that time. These facts are not in dispute. If I am correct in the view that, whatever the merits of the appeal, the determination of the learned trial judge on liability, is unlikely to be overturned, then I must pay due, and at least equal, regard to the counter balancing principle that a litigant ought not to be denied the fruits of his judgment.

It is clear from the section from Halsbury's cited above that the judge has a complete and unfettered discretion not only as to whether to grant the stay, but also to decide upon what terms if any, should be imposed on granting the stay. I take Mr. Samuda's point that the hearing of the appeal may be as soon as the Michaelmas term. He based his opinion on the fact that he understood that the learned trial judge's notes are now ready and this should not delay the hearing. With due respect to Counsel, however, I have to observe that that will not guarantee the early hearing and determination of this appeal. But the truth is that even if it were heard next term, if the plaintiff were again successful, he would have been out of pocket and denied his damages for a further three (3) or four (4) months hence.

I have come to the view that the stay of execution applied for should be granted, particularly in light of the size of the award and I hold that such a stay is also effective to restrain the Bailiff from carrying out the seizure and sale of the defendant's goods under the terms of the writ. But I am also firmly of the view that the interests of justice require that at least some of the damages awarded be paid to the plaintiff. I accordingly order that the stay is to be granted until the hearing of the appeal or until further order of this court.

As a condition of the grant of the stay, I also order that the plaintiff be paid the sum of Three Million Dollars ($3,000,000.00), and the further sum of Three Million Dollars ($3,000,000.00) be placed in an escrow account in an interest-bearing account in a commercial bank in Kingston in the joint names of the attorneys for both parties, to abide the result of the appeal.

There shall also be liberty to apply and I make this part of the Order particularly in view of the uncertainty of the time of hearing and deciding of the appeal.

Costs of this application shall be costs in the appeal.