

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2006/CLE/gen/FP00178

BETWEEN

CITY SERVICES LIMITED

Plaintiff

AND

AES OCEAN CAY LIMITED

Defendant

BEFORE The Honourable Mrs Justice Estelle Gray-Evans

APPEARANCES: Mr Frederick R.M. Smith QC and Mr Dawson Malone for the Plaintiff

Mr R. Oneal Brown for the defendant

HEARING DATE: 31 May 2012

DECISION

Evans, J.

1. In a written Ruling delivered on 9 May 2012:
 - a. I dismissed the defendant's application pursuant to section 5 of the Arbitration Act that this action be stayed;
 - b. I refused the plaintiff's application for summary judgment and gave the defendant leave to defend on the condition that the defendant pays the sum of \$468,477.37, the amount claimed by the plaintiff, into court, failing which the plaintiff should have leave to enter final judgment for the sum of \$468,477.37 together with interest thereon from the date of judgment and costs to be paid by the defendant to be taxed if not agreed; and
 - c. I made the following orders for costs:
 - i. Costs of the defendant's application to stay these proceedings are to be paid by the defendant to the plaintiff to be taxed if not agreed.
 - ii. Costs of the application for summary judgment will be in the cause.
2. By a summons filed 17 May 2012 the defendant sought leave to appeal that decision as well as a stay of execution thereof.
3. On 22 May 2012 I granted the defendant leave to appeal and adjourned the application for a stay.
4. Rule 12 of the Court of Appeal Rules provides that except so far as this Court or the Court of Appeal may otherwise direct, an appeal shall not operate as a stay of execution or of the proceedings under the decision of the court below.
5. In his draft Notice of Appeal the defendant sets out 13 paragraphs of its grounds of appeal including, inter alia:
 - a. The learned judge erred in finding "that at the date of the commencement of this action, 8 September 2006, there was no dispute under the Agreement between the parties that ought to be referred to arbitration pursuant to clause 14.1 of the Agreement, and I so find."
 - b. The learned judge erred in law by granting "leave to defend on the condition that the defendant within 30 days of the date hereof pay into court the sum of \$468,477.37, being the amount of the plaintiff's claim, \$493,477.37, less the sum of \$25,000.00 representing the defendant's claim for damages caused by the plaintiff's vessel, "The Bahamas Sky", to the defendant's pier, failing which the plaintiff should have leave to enter final judgment for the sum of \$468,477.37 together with interest thereon from the date of judgment and costs to be paid by the defendant to be taxed if not agreed" as the said conditions are excessively harsh and tantamount to giving judgment to the respondent.
 - c. The learned judge erred in granting leave to the plaintiff to enter final judgment for the sum of \$468,477.37 should the defendant fail to meet the

conditions set out in paragraph 75 of the judgment, as the action as a whole, inclusive of the plaintiff's summary judgment application ought properly to have been stayed.

6. The defendant's application for a stay of execution is made pursuant to Order 45 rule 11 of the Rules of the Supreme Court which provides as follows:

11. 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.

and is supported by the affidavit of Sharanna A.C. Bodie filed on 31 May 2012 in which she deposes inter alia as follows:

- "5. On 23 May 2012, the defendant filed a notice of appeal in the Court of Appeal.
6. The notice of appeal is for, inter alia, an order to set aside the said judgment in its entirety.
7. That this is a judgment for money and if a stay of execution of the 9th of May 2012 judgment is not granted the defendant will remain under a compulsion to pay and as soon as it does, the substratum of its appeal against the 9th of May 2012 judgment in the Court of Appeal will be irretrievably destroyed and the appeal rendered nugatory.
8. Furthermore, AES Ocean Cay Limited and Ocean Cay Ltd are one and the same company. In 2009, the AES Ocean Cay Limited changed its name to Ocean Cay Ltd."
7. Mr Brown, for the defendant, submits that it is necessary that the aforesaid decision requiring the defendant to pay the sum of \$468,477.37 into court within 30 days of the date thereof, failing which the plaintiff should have leave to enter final judgment, be stayed, otherwise the whole substratum of the defendant's appeal would be destroyed. In support of that submission, counsel relies on the case Metropolitan Real and General Property Trust Ltd v Slaters and Bodega Ltd; Regal Property Trust Ltd v Slaters and Bodega Ltd; Freehold and Leasehold Investment Co Ltd v Slaters and Bodega Ltd [1941] 1 All ER 310 and the judgment of Wilfrid Green MR where he said:

"The fact that payment has been made destroys the whole basis of this appeal, and the result is that the appeal must be dismissed with the usual consequences. Generally, I would say with regard to applications under the Courts (Emergency Powers) Act 1939, that, in the case of a judgment

for money—I say nothing about other cases—where leave to appeal is given to the debtor, it should follow as a matter of course, and it should be expressly stated in the order, that there should be a stay of execution pending the appeal. If that course is not taken, the debtor is under a compulsion to pay. As soon as he pays, the judgment is satisfied, and the substratum of the case is irretrievably destroyed. Therefore, it follows that, where leave to appeal is given to a debtor, the debtor should have a stay of execution in order that his appeal may be determined.”

8. Mr Brown also relies on the judgment of Sawyer J in the case of *Kemp v Grand Bahama Construction Co.* [1997] BHS, J. 105 in which she decided that the court had jurisdiction to grant a stay of execution of its judgment where the defendant has an arguable appeal even though a payment into court by the defendant to satisfy the judgment would not ruin the defendant.
9. Counsel for the defendant submits that the defendant has an arguable appeal and this court having granted leave to appeal should also stay the execution of its decision pending the appeal.
10. The plaintiff opposes the defendant's application and says that the same should be dismissed.
11. Mr Smith QC for the plaintiff argues that there is no proper application before this Court for a stay of execution pending appeal as the defendant's application is made pursuant to RSC Order 45 rule 11 and not under Rule 12 of the Court of Appeal Rules. Further, that the defendant has adduced no evidence of matters which have occurred since the date of the aforesaid decision as required by that rule; and that in that regard, the only ground for a stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable probability of getting them back if the appeal succeeds. For that latter submission, he relied on the judgment of Gonsalves-Sabola, C.J., as he then was, in the case of *Richard Hackett v Inverugie Investments Limited* BHS 145/1975.
12. Counsel for the plaintiff submits further that the defendant has adduced no evidence to show that if it pays the costs ordered under the Ruling (in respect of the defendant's stay application), there is no reasonable probability of getting such costs back if the appeal succeeds nor, he submits, has the defendant adduced any evidence to show that if it pays money into court pursuant to the Ruling, it will suffer prejudice should it succeed on its intended appeal.
13. Counsel for the plaintiff therefore submits that the stay should be refused. However, in the alternative, he submits that if this Court were minded to grant the stay it should be subject firstly, to the defendant paying to counsel for the plaintiff the costs (agreed or

- taxed) on the defendant's stay application, upon the undertaking of counsel for the plaintiff to repay the same to the defendant's counsel if the appeal should be successful (Chamorro v Sandyport BHS No. 855/1990); and secondly, the defendant should deposit the amount claimed by the plaintiff in an interest-bearing account in the joint names of counsel as was done in Kemp v Grand Bahama Construction Co. Ltd BHS 1591/1988.
14. The principles regarding stays of execution pending appeal are not disputed, although their application to this case may be.
 15. The general rule is that an appeal, even an undoubted right of appeal, does not operate as a stay of execution. There is, therefore, no right to a stay of execution and whether or not to grant a stay of execution is purely within the discretion of the court. However, the authorities are clear that that discretion is to be exercised so as to avoid injustice and to prevent the appeal, if successful, from being nugatory. See the judgments of Cotton LJ and Brent LJ in *Wilson v Church (No. 2)* (1879) 12 Ch D 454.
 16. The authorities are also clear that a party claiming that the appeal if successful may be nugatory, must give evidence as to why. It has been held at "as a general rule the only ground for a stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable probability of getting them back if the appeal succeeds. (*Atkins v G. W. Railway* (1886) 2 T.L.R. 400).
 17. As indicated, the defendant makes its application pursuant to RSC Order 45 rule 11. However, the defendant filed no affidavit setting out the "matters which have occurred since the date of the judgment or order" on which it grounds its application for a stay pursuant to RSC Order 45 rule 11 or otherwise and although counsel for the defendant says that not to order the stay would render the judgment nugatory, he provides no evidence other than an averment by Ms Bodie in her affidavit filed 31 May 2012 to the same effect.
 18. In the case of *Metropolitan Real* relied on by counsel for the defendant for his "loss of substratum" point, judgment had been given against the defendant for the recovery of a sum of money and leave was given to the plaintiff to proceed to execution. The defendant was given leave to appeal the latter order but no stay of execution was directed. It was held that in such a case, a stay of execution ought to be granted automatically, since, if the debtor is compelled to pay the sum recovered, the basis of the appeal is destroyed.
 19. In this case, there is no judgment against the defendant, and, therefore, no compulsion, to pay moneys to the plaintiff which it may not be able to recover if its appeal is

successful. I, therefore, accept the submission of counsel for the plaintiff that *Metropolitan Real* is distinguishable from this case in that there is no judgment requiring the defendant to pay to the plaintiff the discounted sums claimed by the plaintiff.

20. Indeed, in my view, all of the cases relied on by counsel for the defendant are distinguishable on the same basis, in that in all of those cases, orders had been made to pay moneys to the plaintiff and not into court.
21. For example, in the *Kemp v Grand Bahama Construction Co* [1997] BHS J. No 105; 1988 No. 1591, Sawyer CJ (as she then was), had ordered, on 9 May 1996, that the sum of \$200,000.00 together with interest be paid to the plaintiff "forthwith". She had previously ordered, on 30 November 1994, that that sum be paid into an interest-bearing account in the joint names of counsel for the parties as a condition for granting a stay pending appeal of the assessment of damages to the Court of Appeal. In granting a stay of her order that the funds be paid to the plaintiff "forthwith", Sawyer CJ commented at paragraph 36:

36. In this case, I think I can say that the appeal is arguable and even though the payments may not ruin the defendants - I have not seen any evidence that it will do so - I do not think that that is a reason not to grant a stay pending an appeal particularly where, as in this case, it is said that if the appeal is successful there is a probability that the plaintiff will not be able to repay any part of the moneys already paid to him if the assessment of damages is held on appeal to be too generous.

22. Then in *Francis Farmer et al v Security & General Insurance Company Ltd*, SCCrApp No. 95 of 2011, John JA had ordered that the appellants in that case pay to the respondent the sum of \$35,000.00 as security for costs and in an application for a stay of that order, the appellants contended that they were unable to pay the security within the time allotted or at all. His Lordship, John JA expressed the view that: "a court should be cautious when dealing with the rights of litigants. The applicants are entitled to appeal the Order of 15 December 2011 and in fact have done so. I must therefore do nothing that may render the appeal nugatory."
23. In this case, firstly there is no judgment against the defendant; secondly, there is no order for payment to be made to the plaintiff direct - the order is for payment to be made into court; thirdly, the defendant, although given leave to appeal, is not entitled to appeal the aforesaid Ruling; and fourthly, there is no allegation or complaint by the defendant as, say in the case of *Francis Farmer*, that the defendant is unable to pay the moneys into court.

24. Let me say here that, in my view, the defendant's application under RSC Order 41 may be premature as there is no judgment for which execution is being sought. In that regard, I agree with counsel for the plaintiff that the application for a stay ought to have been brought pursuant to Rule 12 of the Court of Appeal Rules which provides that: *"Except so far as the court below or the court may otherwise direct (a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below; and (b) no intermediate act or proceeding shall be invalidated by an appeal."*
25. Nevertheless, whether pursuant to RSC Order 45 or Court of Appeals Rule 12 aforesaid, in order to exercise its discretion properly, the court requires evidence, which in this case, the defendant has failed to provide. It is not, in my view, sufficient for the defendant to say that without a stay the appeal would be rendered nugatory without evidence as to how.
26. The case of *Chamorro v Sandyport Development Co* [1991] BHS J. No.177; 1990 No. 855, relied on by the plaintiff, was a case in which an application for a stay of execution of an order for summary judgment made pursuant to RSC Order 14 was applied for pending appeal. In that case, Sawyer J (as she then was), while accepting that the law was that the court does not make a practice of depriving a successful litigant of the fruits of his litigation, nevertheless granted a stay of execution on terms that the defendants pay a sum equal to the judgment debt under appeal into an interest-bearing account in the joint names of counsel for both parties as well as pay the costs (taxed or agreed) under the judgment to the plaintiff's attorneys upon their undertaking to repay the same to the defendant's attorney if the appeal should be successful.
27. In *Chamorro*, summary judgment had been given in favour of the plaintiff.
28. In this case, no judgment has been given in favor of the plaintiff. In fact, the defendant has been given conditional leave to defend the action, albeit, the defendant complains that the condition is "excessively harsh and tantamount to giving judgment to the respondent."
29. Perhaps, but the defendant has provided no evidence to show that it could not meet the condition. Further, the defendant has not, in my view, shown how payment into court will destroy the whole substratum of the defendant's appeal and therefore render its appeal nugatory. Since there is no order to pay those funds to the plaintiff, there is no danger of the defendant being unable to recover the funds should its appeal prove successful.
30. In the circumstances I do not see how the defendant paying into court the amount (as discounted by the plaintiff), which it has admitted it owes to the plaintiff, can be unjust,

particularly as I said, when the defendant has provided no evidence to show that it cannot make the payment.

31. As for the costs ordered to be paid by the defendant to the plaintiff on the defendant's application to stay this action, again the defendant has not provided any evidence to show that if those costs were paid there is no reasonable probability of getting them back if the appeal succeeds.
32. In the case of *Barker v. Lavery* (1884 - 85) 14 Q.B.D. 769, the unsuccessful defendant applied for a stay of execution of the order for costs pending an appeal from the Court of Appeal to the House of Lords but the application was not supported by an affidavit. The Earle of Selborne, L.C., ruled as follows:

"The defendant is not entitled to have the application granted as a matter of course. Evidence ought to have been adduced to shew, that the plaintiff would be unable to repay the costs if he should be unsuccessful before the House of Lords."

33. The Lord Chancellor, in refusing to accede to a request for time to make an affidavit about the plaintiff's means, commented: "we cannot accede to it; those, who apply for a stay of execution, must come before us prepared with all necessary materials."
34. In the result, for the foregoing reasons and in exercise of my discretion, I refuse to grant a stay of execution of the Ruling pending the outcome of the defendant's appeal.
35. However, in relation to the costs payable to the plaintiff on the defendant's failed application to stay these proceedings and refer the matter to arbitration, should those costs (agreed or taxed) be paid to counsel for the plaintiff prior to the determination of the appeal, counsel for the plaintiff should give an undertaking to counsel for the defendant to repay the same if the appeal should be successful.
36. The costs of this application will be costs in the appeal.

Delivered this 4th day of June A.D. 2012

Estelle G. Gray Evans, J.