

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT OF THE BAHAMAS
COMMERCIAL AND LABOUR DIVISION
2011/COM/lab/FP/00001**

**BETWEEN
PHILIP HEPBURN
Plaintiff**



**AND
POLYMERS INTERNATIONAL LIMITED
Defendant**

BEFORE: The Honourable Justice Petra M. Hanna-Adderley
APPEARANCES: Mr. Harvey Tynes, QC and Ntshonda Tynes for the Plaintiff
Mr. Raynard Rigby for the Defendant
HEARING DATE: August 26, 2021

RULING

Hanna-Adderley, J

This is an application for a stay of the Judgment given on December 8, 2020 by the Defendant

Introduction

1. On December 8, 2020 the Court determined that the Plaintiff was wrongfully terminated by the Defendant on July 3, 2009 and awarded him the sum of \$45,509.07 representing his entitlement under Section 29(1)(c)(i) and (ii) of the Employment Act together with interest at the statutory rate according to Section 3 of the Civil Procedure (Award of Interest) Act from the date that the cause of action arose to the date of Judgment, adjourned the matter for the hearing on the assessment of damages inclusive of the Plaintiff's claim for lost medical coverage and costs.
2. Following the Judgment the Defendant filed its Notice of Appeal on January 15, 2021.

3. The Defendant has also filed a Summons on May 5, 2021 pursuant to Section 16(3) of the Supreme Court Act and/or pursuant to Order 31A, Rule 18(2)(d) of the Rules of the Supreme Court ("the RSC") and/or Rule 12(1)(a) of the Court of Appeal Rules and/or under the Court's inherent jurisdiction for a stay of the Judgment of the Court dated December 8, 2020 until the conclusion and determination of the Appeal lodged at the Court of Appeal on January 15, 2021 and costs to be provided for. The Defendant in its Summons states that the application is supported by the Affidavit of Greg Ebelhar sworn on April 27, 2021. The Defendant further relies on the Affidavit of Shade Munroe filed on May 5, 2021 in support of its application. The Defendant also relies on its Written Submissions dated August 25, 2021 and laid over to the Court at the hearing.
4. The Plaintiff opposes the application and relies on his Skeleton Arguments dated May 21, 2021 and laid over to the Court at the hearing.

Statement of Facts

5. In the Defendant's Affidavit in Support of the application, Shade Munroe deposes at paragraphs 3 to 5 that she was informed by Greg Ebelhar that his Affidavit sworn on April 27, 2021 was executed in Naples Florida and that he is currently undergoing treatment for his eyes and awaits an apostille. That she was also informed by Greg Ebelhar that he does not have an idea when the apostille will be obtained from the Secretary of State of Florida. That given the urgency of the matter, the Affidavit executed by Mr. Ebelhar exhibited to her Affidavit is to aid the Court in the determination of the matter.

Submissions

6. Counsel for the Defendant, Mr. Raynard Rigby states the application for the stay is predicated on the Notice of Taxation that is scheduled for September 14, 2021 before the Deputy Registrar. Additionally, he states that the application is

supported by the Affidavit of Shade Munroe filed on May 5, 2021 and that Affidavit reveals several actions taken by the Plaintiff. These include:-

- a. The filing of a Bill of Costs on March 8, 2021 set for taxation on April 28, 2021 which was subsequently adjourned to September 14, 2021;
 - b. The filing of a Garnishee Order Nisi on May 20, 2021 seeking to recover costs in the sum of \$9,595.13;
 - c. The serving of a Statutory Demand dated April 14, 2020 as a step to wind up the Defendant.
7. Mr. Rigby also states that the Record for the Appeal was lodged in the Court of Appeal on June 2, 2021 and the substantive hearing of the Appeal is listed for October 6, 2021.
 8. It is his submission that when determining whether to grant a stay the Court considers whether the Plaintiff (in this case) who has the benefit of the Judgment in his favour, would be driven from the judgment seat or whether the stay would render the 'Ruling' nugatory. Further, he submits that the Court also considers whether the Defendant (in this case, the Applicant for the stay) would be ruined without the stay. That the Court should assess this by looking at the likely prejudice as well as the prospects of success on the appeal.
 9. Mr. Rigby submits that the Court has the jurisdiction to grant a stay under Rule 31A of the RSC and Order 12 of the Court of Appeal Rules and refers the Court to the relevant provisions. He also refers the Court to the case of **In the Matter of Contempt of Court of Donna Dorsett-Major 2020/CLE/gen/0000**, in particular, he draws the Court's attention to paragraphs 23 to 26 and submits that the Court in this case addressed the principles to be considered on a stay application.
 10. It is his submission that if the Plaintiff is allowed to proceed to taxation the Defendant will be gravely prejudiced as the Plaintiff is likely to seek to recover the costs before the hearing and determination of the Appeal (as it previously lodged a Statutory Demand). He further submits that the Affidavit in support references

that as the Plaintiff is unemployed any costs paid may not be recovered and that the hearing of the Appeal is set for October 6, 2021 and thus the stay sought of the taxation hearing will be for a short period. Mr. Rigby also submits that should the Defendant be successful in the Appeal the Notice of Appeal in substance shows an appeal which is meritorious with grounds the Court can be satisfied are likely grounds which are arguable or have some prospect of success, the taxation would amount to a waste of judicial time and the Plaintiff will suffer no prejudice by the short stay sought in the circumstances.

11. Counsel for the Plaintiff, Ms. Ntshonda Tynes notes that the Defendant has essentially received an "unofficial" stay without having made an application as there has been a considerable amount of time between the filing of the Plaintiff's Bill of Costs on March 8, 2021, the taxation hearing originally set for April 20, 2021, adjourned to be heard on May 28, 2021, which was not heard as the Defendant subsequently filed its Summons requesting a stay on May 5, 2021 and the Deputy Registrar adjourning the taxation proceedings pending the outcome of the instant application. Ms. Tynes also notes that the Garnishee Order and Statutory Demand that was served on the Defendant is not related to the present Bill of Cost filed March 8, 2021 but relate to an interlocutory Costs Order made in 2015 and as such sought to execute the same.
12. Ms. Tynes also submits that the Court having delivered its final decision in this matter on December 8, 2020, is now functus officio and is not in a position to proceed with the Defendant's application for a stay.
13. However, she submits that even if the Court was [not] functus or finds that it is functus there is no legal basis for the granting of a stay of a Ruling. Ms. Tynes further submits that there is no evidence before the Court in support of the Defendant's application and the authority relied upon by the Defendant (**In the Matter of Contempt of Court of Donna Dorsett-Major (supra)**) supports the Plaintiff's position that there is a requirement that there be evidence before the Court that demonstrates that the Applicant would face financial ruin if the stay

were not granted, a point highlighted by Justice Charles in the said ruling. Additionally, she submits that the rules and legislation referenced in the Defendant's Summons are not provisions pursuant to which an application for a stay of a "Ruling" can be made. She refers the Court to Section 16(3) of the Supreme Court Act and submits that that provision only declares that the Court's power to stay **proceedings** is unaffected by the Supreme Court Act. Ms. Tynes also refers the Court to Rule 12(1)(a) of the Court of Appeal Rules and submits that that provision clarifies that an appeal does not automatically effect a stay. Additionally, she submits that Order 31A, Rule 18(2)(d) of the RSC gives the Court a discretion to stay **proceedings**, not a "Ruling". Furthermore, she submits that the Court has an inherent jurisdiction to stay **proceedings** so as to prevent an abuse of process and to stay the execution of a judgment or order, although this jurisdiction is limited in its extent. Therefore, it is her submission that the rules, statutes and the Court's inherent jurisdiction contemplate stays of execution and stays of **proceedings**, however the Defendant has not applied for a stay of execution neither for a stay of **proceedings (emphasis mine)**.

14. Ms. Tynes also submits that the relief sought by the Defendant to stay the "Ruling" is unknown to the law as the rules of court do not make any provision for nor do they contemplate the staying of a "Ruling" and neither does the Court's inherent jurisdiction contemplate a stay of a "Ruling".
15. Ms. Tynes submits that there is no evidence before the Court in support of the application on which the Defendant can rely on in support. She submits that the Defendant purports to rely on the Affidavit of Shade Munroe. However, she further submits that that Affidavit seeks to tender into evidence an Affidavit purported to have been sworn by Mr. Greg Ebelhar in Naples, Florida. Ms. Tynes makes several observations relative to Mr. Ebelhar's "Affidavit" and its failure to comply with the provisions of the RSC. She states that :-

- a. Order 41, Rule 8(1) requires that every Affidavit must be filed in the Registry and Mr. Ebelhar's Affidavit has not been filed and contravenes this provision;
- b. Order 41, Rule 9(1) provides that an original Affidavit may not be used in any proceedings unless it has been previously stamped and Mr. Ebelhar's Affidavit has not been stamped and therefore submits it cannot be used;
- c. Order 41, Rule 9(3) provides that a certified copy of a filed Affidavit may be used in proceedings however Mr. Ebelhar's Affidavit is not filed;
- d. Order 41, Rule 10(2) requires that any exhibit to an Affidavit must be identified by a Certificate of the person before whom the Affidavit is sworn and the Certificate must be entitled in the same manner as the Affidavit with rule 1(1)(2) and (3) applying accordingly. She submits that Mr. Ebelhar's Affidavit does not have a Certificate but he purports to exhibit documentation in the absence of one;
- e. Order 41, Rule 11 provides that a document affixed or impressed or subscribed with a seal or signature of a Court, Judge, Notary Public or person with the authority to administer oaths in a part of the Commonwealth outside of the Bahamas in the testimony of an Affidavit taken before it or him, can only be admitted into evidence if the seal or signature of the said person(s) is proved by a certificate which will be conclusive in all respects if it states that the person signing the certificate has such authority. Ms. Tynes submits that Mr. Ebelhar's Affidavit does not abide by the provisions of the proviso of the above order.

Therefore, Ms. Tynes submits that the evidence purportedly before the Court is not filed neither complies with the rules of Court and as such the Court cannot have regard to such an Affidavit that does not abide by the requirements.

16. Ms. Tynes also submits that even if the Affidavit was properly executed and properly before the Court, it still is not useful to the Defendant in support of its application. It is her submission that Mr. Ebelhar in his Affidavit gives his

"considered view" as to the weaknesses of the 'Ruling' of the Court, the strengths of the Defendant's appeal and the likelihood of the 'Ruling' being overturned on appeal. She further submits that Mr. Ebelhar deposes that the Plaintiff if permitted to tax his costs, "may" go on to institute winding up proceedings against the Defendant and that due to the Plaintiff's employment status, in the absence of a stay of the taxation proceedings, the appeal would be rendered nugatory.

17. Ms. Tynes submits that the Defendant's evidence tends toward seeking to justify a stay of the taxation of the Plaintiff's costs. However, she submits that there is no such thing as a stay of taxation and that by virtue of the 'Ruling' the Plaintiff acquired the right to and is under an obligation to tax his costs. She further submits that the Defendant's assertion that taxing costs may lead to execution and taxation should be stayed is wrong as taxation proceedings are not execution as they have nothing to do with execution. Ms. Tynes submits that taxation proceedings are the process mandated by rules of court for assessing the amount of costs due to a successful litigant and to stay, suspend or postpone the taxation of the Plaintiff's costs would be contrary to the Order of the Court that the Plaintiff's costs "be taxed if not agreed". It would also be contrary to the rules of court which require a successful litigant entitled to costs to proceed expeditiously to tax those costs. She submits that the Defendant has not applied for a stay of execution and even if it had, a stay of execution only operates to prevent the judgment creditor from putting into operation the legal process of execution and does not affect rights acquired independently of the process stayed. See **Clifton Securities Ltd v Huntley [1948]** 2 All ER 283.

18. Ms. Tynes also submits that when determining whether to grant a stay of execution pending appeal there has to be good reason for depriving the successful party of the fruits of his judgment at first instance. See **Winchester Cigarette Machinery Ltd v Payne (No. 2), The Times, 15 December 1993**. Further, she submits that the Court will, as a rule, only grant a stay if there are special circumstances, which must be deposed to on affidavit (save where the application

is made at the hearing). Moreover, an example of special circumstances she submits is that an appeal would be nugatory if the stay were refused by reason of the respondent's poverty. **See Barker v Lavery (1885) 14 QBD 769; Wilson v Church (No. 2)(1879) 12 ChD 454, CA.** Ms. Tynes refers the Court to paragraphs 21 to 26 in the case of **In the Matter of Contempt of Court of Donna Dorsett-Major supra** and submits that Justice Charles in paragraphs 24 to 26 of her Ruling emphasized that the onus is on the Defendant who is seeking a stay to demonstrate that he will be ruined and that he has an appeal which has some prospect of success. Ms. Tynes further submits that the Defendant has not placed or properly put Affidavit evidence before the Court and even if the evidence it wishes to rely on were properly before the Court, the Defendant fails to indicate that without a stay it would be ruined.

19. Lastly, she submits that in addition to the requirement for special circumstances, an application for a stay of execution should be made promptly. **See Tuck v Southern Counties Deposit Bank (1889) 42 CHD 471, CA.**
20. Mr. Tynes, QC, also Counsel for the Plaintiff sought to highlight an additional point in the Plaintiff's submissions and states that the Plaintiff concedes that one can seek a stay of execution had there been an attempt by the Plaintiff to enforce the ruling pursuant to the provisions of Order 45 of the RSC. However, there is no evidence of any attempt to enforce the ruling and no attempt to execute on the Judgment which was delivered as part of that ruling. He further submits that had there been an attempt to execute the Judgment, which is the effect of the Ruling, there would be an outstanding proceeding before the Court however the Ruling is no longer before the Court and the Court is functus officio with respect to that Ruling.
21. In response to Counsel for the Plaintiff, Mr. Rigby submits that in substance the Summons was a stay of the proceedings and the Affidavit in support references the pending taxation matter scheduled before the Registrar on September 14, 2021. He further submits that the Affidavit of Shade Munroe does not offend Order

41 of the RSC and complies with the provisions. It is also his submission that the Court has the jurisdiction to hear an application for a stay of the proceedings before it (i.e. the taxation proceedings) as it is not functus. He further submits that the Affidavit addresses issues and the circumstances as to why a stay is required. The issues are that the costs is taxed in light of the steps taken by the Plaintiff in this matter and that the Defendant is likely to be prejudiced by either the service of the Statutory Demand or the Garnishee Order that was previously done. Lastly, Mr. Rigby submits that the facts before the Court shows that the Plaintiff has not challenged that the substantive appeal is set before the Court of Appeal on October 6, 2021. He submits that the stay will be extremely short in the circumstances and what is being sought by the Defendant is a stay of proceedings and in particular a stay of the taxation proceedings before the Registrar pending the determination of the Appeal.

Issues

22. The Court must determine (1) whether it is functus following the pronouncement and perfecting of its Judgment on December 8, 2020; and if not (2) whether justice requires that a Stay be granted and (3) whether the appeal has some prospect of success which would justify a stay of the proceedings.

Analysis and Discussion

The Law

23. **Section 16(3)** of the **Supreme Court Act** states:-

“Nothing in this Act shall affect the power of the Court to stay any proceedings before it, where it thinks fit to do so, either of its own motion or on the application of any person whether or not a party to the proceedings.”

24. **Order 31A, Rule 18(2)(d)** of the **RSC** states:-

“(2) Except where these Rules provide otherwise, the Court may —
(a);

(b);

(c) ;

(d) stay the whole or part of any proceedings generally or until a specified date or event"

25. **Rule 12(1)(a)** of the **Court of Appeal Rules** states:

"(1) 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..."

26. According to **Halsbury's Laws of England, 4th Edition**, under the rubric **Stay of Proceedings Generally** at paragraph 437;

"A stay of proceedings usually arises under an order of the court which puts a stop on the further conduct of the proceedings in that court at the stage which they have then reached, so that parties are precluded thereafter from taking any further step in the proceedings."

27. Additionally, the effect of a stay of proceedings is not permanent meaning that the action still subsists and the stay may be removed if proper grounds are shown to do so. **See Halsbury's Laws of England, 4th Edition, Volume 37, Stay of Proceedings, Effect of stay proceedings, para 438**

28. According to **Halsbury's Laws of England, 4th Edition**, under the rubric **Stay of execution generally** at paragraph 451;

"..., 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 action itself."

29. The applicable principles on stay pending appeal applications is dealt with in **Oggers On Civil Court Actions** at page 460 which states:

"Although the court will not without good reason delay a successful plaintiff in obtaining the fruits of his judgment, it has power to stay execution if justice

requires that the defendant should have this protection[...] [The] court has wide powers under the Rules of the Supreme Court.”

Discussion

30. While the Defendant’s Summons seeks a stay of the ‘Ruling’ of the Court, Mr. Rigby has conceded and I accept that the Defendant’s application before the Court is for a stay of the taxation proceedings flowing from the costs order made in the Judgment.
31. However, before the Court can determine whether a stay is justified, I must consider Ms. Tynes’ submission that the Court is functus.
32. While no authority was given by Ms. Tynes in support of her submission, as I understand it the doctrine of functus officio applies when a justice has discharged all of his/her judicial functions in a case. **See Halsbury’s Laws of England, 4th Edition, Volume 29, Magistrates; The doctrine of functus officio, para 390.**
33. The Court of Appeal in **Rosina Smith v Fidelity Bank (Bahamas) Limited SCCivApp No. 122 of 2020** at paragraphs 34 to 41 also considered whether the Trial judge in that case was correct when she ruled that she was functus officio and did not have the jurisdiction to set aside the perfected order in that matter. At paragraph 34 the Justices stated that it is a well settled principle at common law that a judge has jurisdiction to reverse his decision at any time before it is perfected, but not afterwards. Additionally at paragraph 37 they refer to Sir John Donaldson, MR in **Regina v. Cripps, ex parte Muldoon et al [1984] QB 686** where he stated “*It is well settled that any judge is fully entitled to reconsider and vary any decision at any time before the order embodying or based upon that decision has been perfected (In re Suffield and Watts, ex parte Brown 12 (1888) 20 QBD 693, 697, per Fry LJ) although in some circumstances he may be under an obligation to give the parties a further opportunity to be heard. At that stage, no slip rule power is needed. However, once the order has been perfected, the trial*

judge is functus officio and, in his capacity as the judge, has no further power to reconsider or vary his decision whether under the authority of the slip rule or otherwise." Furthermore, they affirmed then Chief Justice Sir Michael Barnett's decision that he was functus in **Palms of Love Beach Building B Management Company et al v. Love Beach Properties Ltd et al 2010/CLE/gen/001673** following the Second Defendant's filing of two Summonses seeking various orders, such as a stay of all further proceedings, an order setting aside all previous proceedings and the dismissal of the Originating Summons; and an order vacating, dismissing and discharging the Writ of Possession and all other orders affecting the condominiums after the Order granted in the matter was perfected on February 14, 2013. Therefore, after considering the well settled principle the Justices concluded in their Ruling that once the Order obtained in the Supreme Court had been perfected, there was no way for it to be set aside or discharged as the trial Judge was functus. They further stated that no judge of the Supreme Court had the jurisdiction to grant the relief the intended appellant sought in her Re-Amended Summons.

34. The Plaintiff in this action was awarded Judgment for his claim for wrongful dismissal by the Defendant on July 3, 2009. The Defendant was ordered to pay the Plaintiff the sum of \$45,509.07 which represents his entitlement under Section 29(1)(c)(i) and (ii) of the Employment Act with interest, damages to be assessed and costs on December 8, 2020. The Order was duly perfected and filed on March 5, 2021. The Defendant filed its Summons seeking a stay of the said Ruling until the conclusion and determination of the Appeal on May 5, 2021.

35. The Court of Appeal case **Rosina Smith v Fidelity Bank (Bahamas) Limited (supra)** is helpful and instructive. Considering the facts of the cases referred to by the Court of Appeal in that case, the Applicants applications before the Court were to vary or set aside the Order/Ruling/Judgment given by the Court in addition to other items for relief. In the instant case, the Defendant has not asked the Court to vary or set aside the Judgment given but to effectively put a stop to a part of

the usual course of litigation, i.e. taxation. However, does this still mean that the Court has the jurisdiction to entertain the Defendant's Summons? In the circumstances, I find that the Defendant is not asking the Court to set aside or vary its Judgment or any part thereof and that the Court is not functus and may consider whether justice requires a stay pending the determination of the appeal to be granted.

Stay

36. I accept Ms. Tynes' submission that Rule 12(1)(a) of the Court of Appeal Rules clarifies that an appeal does not automatically effect a stay.

37. Justice Indra Charles in **In the Matter of Contempt of Court of Donna Dorsett-Major (supra)** and again in **Robert Adams (as beneficiary of the estate of Raymond Adams) and Gregory Cottis (as executor of the estate of Raymond Adams) 2018/PRO/cpr/00035** sets out the principles relating to an application before the Court for a stay of proceedings pending an appeal as follows. In accepting that the Court has wide powers under the Rules of the Supreme Court when determining whether to grant a stay, as to how that discretion ought to be exercised in these circumstances I refer to Brett, LJ in the case of **Wilson v Church No. 2 [1879]** 12 Ch.D. 454 at 459 where he states: "This is an application to the discretion of the Court, but I think that Mr. Benjamin has laid down the proper rule of conduct for the exercise of discretion, that where the right of appeal exists, and the question is whether the fund shall be paid out of Court, the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory."

38. Justice Charles also referred to the case of **Linotype-Hell Finance Ltd. v Baker** [1993] 1 WLR 321 in which Staughton L.J. opined at page 323:

"It seems to me that, if the 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 a legitimate ground for granting a stay of execution."

39. As I understand L.J. Staughton above, a Court may grant the application of an unsuccessful party if he is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success. This however requires evidence and not bare assertions.

40. Justice Charles also referred to the case of **Hammond Suddards Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065 at para 22 (per Clarke JL and Wall J) which sets out additional principles that the Court should be guided by in considering an application for a stay pending an appeal:

"By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has a discretion whether or not to grant a stay. Whether the court should 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?"

41. Finally, Justice Charles referred to the guidance given by the English Court of Appeal in **Leicester Circuits Ltd v Coates Brothers plc** [2002] EWCA Civ 474 where at para 13, Potter LJ said:

"The proper approach is to make the order which best accords with the interests of justice. Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives to decide which is less likely to cause injustice. The normal rule is for no stay, but where the justice of that approach is in doubt, the answer may well depend on the perceived strength of the appeal."

42. It is against the above legal backdrop that the Court will consider this application.

The Evidence

43. It is not disputed between the parties that the substantive appeal in this matter is scheduled before the Court of Appeal on October 6, 2021. Mr. Rigby and Ms. Tynes have both helpfully referred the Court to the ruling of Justice Charles in **In the Matter of Contempt of Court of Donna Dorsett-Major (supra)**. While it is not binding on this Court, I have found my sister Judge's Ruling to be instructive.
44. Mr. Rigby has submitted above that if the Plaintiff is allowed to proceed to taxation the Defendant will be gravely prejudiced as the Plaintiff is likely to recover the costs before the hearing and determination of the Appeal. He has also submitted that the Affidavit in support references that as the Plaintiff is unemployed any costs paid may not be recovered. While Mr. Rigby has made the above submissions, based on my understanding of Staughton L.J in **Linotype-Hell Finance Ltd. v Baker (supra)** the burden is on the Defendant to satisfy (or say to) the Court that he will be ruined and that the appeal has some prospect of success. Additionally, in **Winchester Cigarette Machinery Ltd v Payne (No.2) (supra)** a case referred to by Ms. Tynes, Hobhouse, LJ at paragraph 32 stated that "The Appellant must show some special circumstances which take the case out of the ordinary so that the ordinary rule should not apply and a stay be granted. If showing that such circumstances exist involves making good factual submissions, **the facts have to be made good by evidence (emphasis mine).**"
45. I am not satisfied that the Defendant has adduced any evidence to show that a refusal of a stay will ruin the Defendant and the prospect of success of the Defendant's Appeal. In reviewing the Affidavit of Shade Munroe the Defendant attempts to adduce an Affidavit which does not comply with Order 41 of the RSC. In particular, she states at paragraphs 3 and 4 that the Affidavit of Greg Ebelhar was sworn on April 27, 2021 and executed in Naples, Florida as he was currently undergoing treatment for his eyes and awaits an apostille, although he had no idea when the apostille would be obtained from the Secretary of State of Florida. Further, at paragraph 5 she states that given the urgency of the matter the

"executed" Affidavit was exhibited to her Affidavit to aid the Court in the determination of the matter. Ms. Munroe's Affidavit was filed on May 5, 2021 and the "executed" Affidavit was sworn on April 27, 2021 some 4/5 months before the Defendant's application was heard yet the Defendant has not offered any reason as to why Mr. Ebelhar's original Affidavit has not been apostilled and filed in this matter, thus complying with the provisions of the RSC. More so, Mr. Rigby's submissions that the Plaintiff will seek to recover the costs before the hearing and determination of the Appeal is not supported by any evidence before the Court and as such this bare assertion is not accepted by the Court.

46. Further, I accept Ms. Tynes' submission that the Defendant's failure to comply with Order 41 of the RSC in regards to the purportedly sworn Affidavit of Mr. Greg Ebelhar precludes the Court from considering its contents as evidence before the Court in support of the Defendant's application. This includes any evidence relating to possible ruin of the Defendant in the absence of a stay or the grounds of appeal and the Defendant's prospects of success of the same.
47. Mr. Rigby has also submitted that if the Court of Appeal finds in favour of the Defendant the taxation would amount to a waste of time. This is indeed correct in that a successful appeal is likely to reverse the order as to costs that was made.

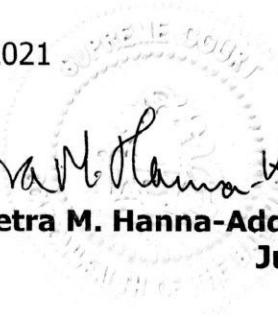
Conclusion

48. However, given that the Defendant has failed to adduce **ANY** evidence to satisfy the Court of any special circumstances or that the Defendant will face financial ruin in the absence of the grant of the stay and has not placed before the Court the grounds of appeal to which the Court can determine if any provide some prospect of success, in all the circumstances of this case, the Court must conclude that no harm or injustice would befall the Defendant should a stay be refused. A stay is hereby refused (**emphasis mine**).

Disposition

49. In conclusion, I hereby dismiss the Summons filed on May 5, 2021 seeking a stay pending appeal. As costs usually follow the event and I see no reason to depart from this general rule the costs in this application are awarded to the Plaintiff to be taxed if not agreed.

Dated this 6th day of September, A.D. 2021



Petra M. Hanna-Adderley
Petra M. Hanna-Adderley
Justice