COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2019/CLE/gen/00593

BETWEEN

ENOS R. MILLER

Plaintiff

AND

MCKINNEY, BANCROFT & HUGHES

First Defendant

AND

HARTIS E. PINDER

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Enos Miller appearing pro se

Ms. Knijah Knowles with her Mr. Timothy Eneas of McKinney, Bancroft & Hughes for the Defendants

Hearing Date: 1 February 2021

Practice - Leave to appeal – Stay of execution- Principles on which application should be considered – Grounds of appeal – Whether the grounds have reasonable prospect of success –Whether issue of public importance which requires clarification by the Court of Appeal

On 1 November 2020, I dismissed the Plaintiff's Writ of Summons and Statement of Claim on the ground that it fails to disclose a reasonable cause of action and/or is an abuse of the process of the Court. The Defendants, being the successful party in these proceedings, are awarded their costs to be taxed if not agreed. Aggrieved by the decision of this Court, the Plaintiff properly applies for leave to appeal as well as a stay of execution of the Ruling.

The Plaintiff advances 14 grounds of appeal; 13 of them being bare and vague grounds. When distilled, the grounds raise the following issues namely (i) the Court did not have jurisdiction to strike out the Plaintiff's Writ of Summons and Statement of Claim; (ii) the Defendants did not plead the defence of laches nor did they apply to amend their defence to include such a pleading and (iii) the judge erred in holding that Colina was entitled to the deposit. There are also allegations of irregularities in the Ruling according to the Plaintiff. These are subsumed in the three principal

grounds. The Plaintiff says that he has a reasonable prospect of success in the appeal and that there is an issue of public importance which requires clarification by the Court of Appeal.

The Defendants oppose the Motion for leave to appeal and stay.

HELD: dismissing the Notice of Motion for leave to appeal and stay of execution with costs to the Defendants to be taxed if not agreed;

1. The principles that a court should apply in determining an application for leave to appeal are as follows:

    a. It is part of the function of the Court in considering applications for leave to appeal to weed out hopeless appeals;

    b. The Court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal;

    c. The Court may grant the application even if not so satisfied for other reasons. Those reasons include where the issue is one which it would be in the public interest for the Court of Appeal to examine or where the case raises an issue where the law requires clarification;

    d. If there is any doubt whether leave should be granted, the safe course is to refuse leave, as it is always open to the Court of Appeal to grant leave.

2. The proposed grounds of appeal raised by the Plaintiff have no realistic prospect of success in that:

    (1) With respect to the Striking Out action, all parties (including the Plaintiff) were fully aware that the hearing was in the manner of an Order 18 rule 19 application: see paragraph 18 of the Ruling. Furthermore, a formal Summons to strike out was filed and served on the Plaintiff, albeit at the hearing. In addition, the Court has wide powers pursuant to Order 31A to manage cases actively. Such management may include striking out of the Writ and Statement of Claim if it discloses no reasonable cause of action and/or it is frivolous and vexatious and/or may prejudice, embarrass or delay the fair trial of the action and/or is an abuse of the process of the Court.

    (2) The doctrine of laches is properly pleaded by the Defendants: see paragraph 22 of the Defendants' Defence filed on 5 June 2019.

    (3) The Court did not "hold" that Colina was entitled to the deposit. The Court stated at various portions of the Ruling that the deposit was transferred to Colina by the Second Defendant on the basis that Colina was entitled to the deposit as a consequence of the Plaintiff's failure to complete the transaction. This is a position that was readily and easily established on the evidence by both parties. In fact, it was the Plaintiff who provided this evidence.

(4) The proposed grounds of appeal raise no issue of public importance which requires clarification by the Court of Appeal.

(5) The application for stay is also dismissed. The Defendants should not be deprived of the fruits of their litigation.

RULING

Charles J:

Introduction

[1] On 2 December 2020, Enos Miller ("the Plaintiff") filed a Notice of Motion ("the Motion") seeking leave to appeal and a stay of the written ruling which I delivered on 1 November 2020 ("the Ruling"). In that Ruling, I dismissed the Plaintiff's Writ of Summons and Statement of Claim on the ground that it failed to disclose a reasonable cause of action against McKinney Bancroft & Hughes and Hartis Pinder ("the Defendants") and/or is an abuse of the process of the Court. The Court awarded costs to the Defendants to be taxed if not agreed. The Motion was supported by an affidavit of the Plaintiff sworn to on 30 November and filed on 2 December 2020. The Plaintiff also swore a second affidavit entitled "Second Affidavit in support of Leave to Appeal to the Court of Appeal" on 5 February 2021. The Second Affidavit was filed on 8 February 2021, after the hearing of the Motion (which took place on 1 February 2021). Since Counsel for the Defendants and the Court did not have the benefit of the Second Affidavit at the hearing, the Plaintiff cannot rely on it.

[2] The Plaintiff, being aggrieved by the Ruling, seeks leave to appeal and a stay of execution of the Ruling on 14 grounds namely:

1. The Defendants did not file a preliminary issue application to dismiss the Plaintiff's Writ of Summons, whereby it was not open to the judge to dismiss the Plaintiff's Writ of Summons altogether and determine that the Plaintiff failed to disclose a reasonable cause of action and/or an abuse of the process of the Court.
2. No pleaded Laches Defences;

3. No amendment of Defences;
4. No determination of imperial and/or proven evidence before Final Judgment;
5. Violation of the Plaintiff's civil right to a fair trial;
6. Judgment irregularity;
7. Violation of the Doctrine of Separation of Powers;
8. Failure to give reasons, precedent principle and rule in Judgment;
9. Judicial discretion was not exercised judicially;
10. No preliminary issue application before the Court;
11. Overriding law breach of Constitutional Provisions Powers;
12. Breach of Rule of Procedure;
13. That the Plaintiff was denied Common Justice; and
14. That as a matter of justice or law it requires to be corrected.

Jurisdiction

[3] The requirement for a party to an action to obtain leave to appeal an interlocutory order of this Court is set out at section 11 (f) of the Court of Appeal Act, Chapter 52 of the Revised Laws of the Commonwealth of The Bahamas (the "CAA"). To the extent relevant, that section provides:

> **"No appeal shall lie –**
>
> **(a) …**
>
> **(f) without the leave of the Supreme Court or of the court from any interlocutory order or interlocutory judgment made or given by a Justice of the Supreme Court except…"**

[4] As the order to strike out is an interlocutory order, leave to appeal such order is required: See: Adderley J (as he then was) in **Lady Henrietta St. George et al v Sir Jack Hayward et al** 2006/CLE/gen/FP/0223A and 223B/06 (unreported) at paragraphs 5 and 6.

[5] The Plaintiff has therefore properly applied for leave to appeal and a stay of execution within the time limited for such applications.

The law on leave to appeal

[6] Exactly, a week ago, on 5 February 2021, this Court in **Robert Adams (a beneficiary of the Estate of Raymond Adams v Gregory Cottis (as Executor of the Estate of Raymond Adams** [2018/PRO/cpr/00035] [unreported] set out the general principles governing whether leave to appeal should be granted in paragraphs 14-20 of that Ruling as follows:

> **'[14] …In this respect, part of the Court's function is to weed out unmeritorious claims and to deter parties from commencing frivolous appeals. As stated by the English Court of Appeal in Practice Note (Court of Appeal: procedure) [1999] 1 All ER 186, it is a part of the Court's function to weed out hopeless appeals. In this regard the Court of Appeal provided the following guidance:**
>
> > **"7. The experience of the Court of Appeal is that many appeals and applications for leave to appeal are made which are quite hopeless. They demonstrate basic misconceptions as to the purpose of the civil appeal system and the different roles played by appellate courts and courts of first instance. Courts of first instance have a crucial role in determining applications for leave to appeal."**
>
> **[15] The appeal systems and the requirement to obtain leave are imposed to avoid the expenditure of money and time on appeals which have no hope of success. The guiding principle in determining whether leave to appeal should be granted is set out in the Practice Note provided in the leading case of Smith v. Cosworth Casting Processes Ltd. (1997) 4 All ER 840 where Lord Woolf stated:**
>
> > **"The Court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. Why, however, this court has decided to adopt the former phrase is because the use of the word 'realistic' makes it clear that a fanciful prospect or an unrealistic argument is not sufficient".**
>
> **[16] If there is any doubt that leave ought to be granted, the safe course is to refuse leave to appeal, as set out at paragraph 8 of the 1999 Practice Note (Court of Appeal: procedure) where it was stated:**
>
> > **"[I]f the court of first instance is in doubt whether an appeal would have a real prospect of success or involves a point of general principle, the safe course is to refuse leave to appeal. It is always open to the Court of Appeal to grant leave."**

[17] Therefore, if the Court considers that there is doubt as to the prospects of success of the Appeal, then leave to appeal should be refused.

[18] The principles set out in Cosworth were accepted and relied upon by Jon Isaacs J (as he then was) in Bethell v. Barnett and others [2011] 1 BHS J. No. 64. In Bethell, His Lordship stated, at paragraph 9:

> **"In Smith v Cosworth Casting Processes Ltd. [1997] 4 All ER 840 Lord Woolf, MR provides guidelines for applications for leave to appeal. I mention the first two of them:**
>
> **"36 The guidance is as follows:**
>
> 1. **The court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. Why however this court has decided to adopt the former phrase is because the use of the word "realistic" makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.**
>
> 2. **The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying." "**

[19] The principles derived from Cosworth principles were followed in many other cases. For instance in In the Matter of the Petition of Scott E. Findeisen and Brandon S. Findeisen (as Trustees of the Stephen A. Orlando Revocable Trust) (2016/CLE/qui/01564), unreported, 15 June, 2020 this Court restated, commencing at paragraph 9 of the Ruling, the well-known guidance of Lord Wolff in Smith v Cosworth Casting Processes Limited (1997) 4 All ER 840. Specifically that:

(i) **Leave to appeal will only be refused if the applicant has no realistic prospect of succeeding; and**

(ii) **Leave to appeal may even be granted where there is no realistic prospect of success but where there is an issue of a public interest or the law requires clarification.**

[20] At paragraph 11 of Findeisen, this Court stated:

> **"Our courts have consistently followed the guidance given by Lord Wolff. In *Keod Smith v Coalition To Protect Clifton Bay* (SCCivApp No. 20 of 2017), Isaacs JA succinctly summarized**

> **the test to be applied by a court when determining whether to grant leave. At paragraph 23 of the Judgment, he stated:**
>
> **"The test on a leave application is whether the proposed appeal has realistic prospects of success or whether it raises an issue that should in the public interest be examined by the court or whether the law requires clarifying: per Lord Woolf in *Smith v Cosworth Casting Process Ltd* [1997] 4 All ER 840."**
>
> **[12] Additionally, in *AWH Fund Limited (In Compulsory Liquidation) v ZCM Asset Holding Company (Bermuda) Limited* [2014] 2 BHSJ No. 53, the Court of Appeal held:**
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> > **"The Court will refuse an application for an extension of time if satisfied that the applicant has no realistic prospect of succeeding on the appeal. Further, the court can grant the application even if it [sic] not so satisfied where the issue raised may be one which the court considers should in the public interest be examined by the court or where, the court takes the view that the case raises an issue of law which requires clarifying."**

[7] Simply stated, the principles which can be distilled from the above cases are:

1. It is part of the function of the Court in considering applications for leave to appeal to weed out hopeless appeals;

2. The Court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal;

3. The Court may grant the application even if not so satisfied for other reasons. Those reasons include where the issue is one which it would be in the public interest for the Court of Appeal to examine, or where the case raises an issue where the law requires clarification; and

4. If there is any doubt whether leave should be granted, the safe course is to refuse leave, as it is always open to the Court of Appeal to grant leave.

[8] The only relevant reason to grant leave in this case is if the Plaintiff has a realistic prospect of success on appeal as raised in the Motion and Affidavit in support: see paragraphs 66-67 of his Affidavit. In his submissions, the Plaintiff contends that the appeal involves a point of public importance which requires clarification by the Court of Appeal. This was not expressly spelt out in the Motion and/or Affidavit in support. Submissions do not rise to the level of pleadings. That said, if I understand

the Plaintiff very well, he says that the question that requires clarifying is whether the Limitation Act applies to the law of unjust enrichment. At paragraph 40 of the Ruling, this is what the Court stated:

> **"<u>It is accepted that there is no express limitation periods set out in the 1995 Act which deals with restitutionary claims. I also agree with the Plaintiff that the 1995 Act does not apply to restitutionary relief.</u> However, causes of action which are grounded in restitution (such as a claim for unjust enrichment) are for the purposes of limitation either dealt with by applying the statutory limitation period by analogy and/or are subject to the equitable doctrine of laches…."** [Emphasis added]

[9] This issue has long been settled and I agree with Counsel for the Defendants that there is nothing concerning the determination in paragraph 40 of the Ruling which requires clarification in the context of this case. For this reason, I am not persuaded that there is any basis for considering the Plaintiff's application for leave under the clarification ground.

The grounds of appeal

[10] As already stated, there are 14 grounds of appeal. Apart from paragraph 1 of the Motion, the Plaintiff has provided no particulars in respect of the grounds of appeal alleged. As learned Counsel for the Defendants, Ms. Knowles correctly pointed out, the Defendants as well as the Court are left to surmise how the judge erred in fact and/or in law. The Affidavit in support of the grounds for appeal contains paragraphs that are unclear and muddled.

[11] That being said, the principal grounds which may be distilled from the Motion and the Affidavit in support are:

1. The Court did not have the jurisdiction to strike out the Writ of Summons and the Statement of Claim;
2. The Defendants did not plead the defence of laches and there was no application/order granted to the Defendants to amend their pleadings to add the defence of laches;
3. The judge erred in holding that Colina was entitled to the deposit.

4. The judge erred and made a plethora of procedural irregularities (this ground is subsumed within the aforesaid three heads mentioned above).

Jurisdiction to strike out

[12] If I understand the Plaintiff correctly, he appeared to be suggesting that there was no formal application before the Court to strike out the Plaintiff's Writ of Summons and Statement of Claim. Consequently, the Court had no jurisdiction to do so. In that regard, the Plaintiff contends that his right to a fair civil trial was violated: see paragraphs 6 - 8, 41, 42, 44 of the Affidavit.

[13] On the hearing of the Plaintiff's summary judgment application on 12 December 2019, the Court made the following order which I reproduce fully:

> **1. "The Summons filed by the Plaintiff on the 19th June 2019 is hereby withdrawn and dismissed with the costs of the application being costs in the cause.**
>
> 2. **The preliminary issue of whether the Plaintiff's claims alleged in the Writ of Summons filed on the 30th April, 2019 are either statute barred pursuant to the Limitations Act, Ch. 83 or violate the doctrine of laches is adjourned to the 20th February, 2020 at 2:30 p.m.,**
>
> 3. **The parties are to email written submissions canvassing the preliminary issue to the Court in Microsoft word format no later than the 12th February, 2020. Physical copies of the submissions are to be lodged with the Court's clerk no later than the 13th February 2020.**
>
> 4. **The parties are to exchange written submissions canvassing the preliminary issue no later than the 12th February, 2020. Any reply submissions by either of the parties are to be exchanged between the parties and emailed to the Court in Microsoft Word format no later than the 18th February, 2020.**
>
> 5. **Subject to any order made following the hearing of the preliminary issue there shall be a further Case Management hearing on the 18th November 2020 at 10.00 a.m.**
>
> 6. **Subject to any order made following the hearing of the preliminary issue, there shall be a pre-trial review hearing on the 28th July, 2021 at 10 a.m.**
>
> 7. **Subject to any order made following the hearing of the preliminary issue the trial of the action will take place on the 1st, 2nd & 3rd of September, 2021 beginning at 10 am each day.**

8. **The parties shall have liberty to apply".**[Emphasis added]

[14] This Order was approved by the Court on 20 February 2020 and filed on 21 February 2020. There is no appeal from this Order.

[15] In addition, a formal Summons to strike out the Plaintiff's application was filed and served on 20 February 2020 ("the Summons") just prior to the commencement of the hearing. Before the commencement of the hearing on 20 February 2020, it was agreed by all parties that the hearing was in the manner of an Order 18 rule 19 application. This is reflected at paragraph 18 of the Ruling: see also Transcript of the Proceedings dated 20 February 2020 at pages 1 to 5.

[16] The Summons sought an order pursuant to Order 18 rule 19 of the Rules of the Supreme Court that the Plaintiff's Statement of Claim be struck out on the grounds that it (a) disclosed no reasonable cause of action; (b) was scandalous, frivolous or vexatious; (c) may prejudice, embarrass or delay the fair trial of the action; or (d) it is otherwise an abuse of the process of the court. By the Summons the Defendants also sought an order that the action be dismissed.

[17] It is therefore erroneous for the Plaintiff to claim that the Court did not have the jurisdiction to dismiss the action. By the terms of paragraph 2 of the Case Management Order dated 12 December 2019 and filed on 21 February 2020, the parties had adequate notice of the issues to be determined by the Court at the 20 February 2020 hearing and accordingly no prejudice was suffered by the Plaintiff. For this reason this ground has no reasonable prospects of success on appeal.

[18] Furthermore, the Plaintiff's contention that an application to strike out the Defendants' action was not filed is incorrect. At the hearing of the Plaintiff's Summary Judgment application on the 12 December 2020, Counsel for the Defendants addressed the court on the possibility of the matter being disposed of with reference to the determination of a preliminary issue.

[19] In any event, it is a part of the court's active case management role to ascertain the issues at an early stage which may include striking out of an applicant's claim if (a) it discloses no reasonable cause of action; (b) is scandalous, frivolous or vexatious; (c) may prejudice, embarrass or delay the fair trial of the action; or (d) it is otherwise an abuse of the process of the court.

[20] The court, when exercising the power to strike out, will have regard to the overriding objective of Order 31A of the Rules of the Supreme Court ("RSC") and to its general powers of management. The court may dismiss or give judgment on a claim after a decision on a preliminary issue: O. 31A r. 18(2)(i). In addition, O. 31A r. 20 (1) (c) gives the court the power to strike out a pleading or part of a pleading if that pleading or the part to be struck out discloses no reasonable grounds for bringing or defending the claim. This is analogous to O. 18 r. 19 of the RSC. Furthermore, the court can even hear and determine an application of its own initiative. In short, O. 31A is a powerful weapon in the court's arsenal. That said, the court is also very conscious that striking out is often described as a draconian step as it usually means that either the whole or part of that party's case is at an end. Therefore, the summary power to strike out a pleading should be exercised only in plain and obvious cases when the alleged cause of action is certain to fail; as in the present action.

Was the doctrine of laches properly pleaded?

[21] The Plaintiff argued, quite elaborately in his affidavit and submissions, that the doctrine of laches was not properly pleaded as a defence to the Statement of Claim. Consequently, the Plaintiff contended this purported lack of pleading violates the rules of procedure and acts as an issue and fact estoppel. In the Plaintiff's view this alleged error rendered the Ruling nugatory [see paragraphs 15-22, 26, 33-37, 40, 49 and 51 of the Affidavit].

[22] The Plaintiff is wholly incorrect. At paragraph 22 of the Defendants' Defence filed on 5 June 2019, the Defendants averred:

> **"22. As a consequence of the contractual nature of the obligations on the part of the Defendants as stakeholder, described in paragraph 21 above, the Defendants contend (in the alternative to the matters set out in paragraph 18 above) that any alleged claim, cause of action, right or entitlement to relief or damages pleaded in the Statement of Claim resulting from any alleged breach of the Agreement for Sale or the Stakeholder Agreement is barred by the provisions of the Limitation Act, 1995 or <u>in the further alternative by the doctrine of laches</u>. Additionally and/or alternatively, any claim set out in the Statement of Claim resulting from any alleged breach of a duty of care on the part of the Defendants or any other tortious claim is barred by the provisions of the Limitation Act, 1995."**

[23] It goes without saying that this ground of appeal is unmeritorious and has no realistic prospect of success.

The judge erred in holding that Colina was entitled to the deposit.

[24] The Plaintiff challenged, what he describes as "the holding", that Colina was entitled to the deposit and as such no unjust enrichment occurred to the Defendants as the deposit was applied to the Plaintiff's debt: see paragraphs 31-37 of the Affidavit. The Plaintiff contended that this holding is a mistake and renders the decision irregular.

[25] This is wrong. The Court stated, at various portions of the Ruling, that the deposit was transferred to Colina by the Second Defendant on the basis that Colina was entitled to the deposit as a consequence of the Plaintiff's failure to complete the transaction. This is a position that was readily and easily established on the evidence of both the Plaintiff and the Defendants. Indeed, the evidence establishing that the deposit was applied to the Plaintiff's debt was provided by the Plaintiff himself. Consequently, on the Plaintiff's own evidence, he was unable to establish unjust enrichment. This ground of appeal also has no realistic prospect of success.

[26] At paragraphs 50 and 51 of his Affidavit, the Plaintiff appeared to be arguing that the application of the Statue of Limitations to the equitable claims raised in the present case by way of analogy violates the doctrine of separation of powers and is contrary to public policy.

[27] At paragraph 40 of the Ruling, the Court comprehensively detailed the law of limitation relative to equitable remedies. The Court concluded that the periods set out in the Statute of Limitations are not binding on equitable claims and further found that the delay of 20 years in instituting this action is inexcusable and that such lengthy delay defeats equity. At paragraph 41, the Court quoted an excerpt from the General Editor of **Snell's Principles of Equity 31st Ed** at page 99, paragraphs 5-16 which states:

> **"Delay defeats equity or equity aids the vigilant and not the indolent. In the words of Lord Camden L.C. a court of equity "has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing." Delay which is sufficient to prevent a party from obtaining an equitable remedy is technically called "laches."** [Emphasis added]

[28] This ground also has no reasonable prospect of success.

The law on stay pending appeal

[29] In this regard, I can do no better but to reproduce what I stated in **Robert Adams** [supra] with respect to the law on stay pending appeal. At paragraphs [22] to [24] of that Ruling, I stated:

> **"[22] Order 31A Rule 18(2)(d) provides that the Court may stay the whole or part of any proceedings generally or until a specified date or event.**
>
> **[23] Further, rule 12(1)(a) of the Court of Appeal Rules, 2005 provides:**
>
> > **"(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."**
>
> **[24] In the Matter of Contempt of Donna Dorsett-Major on 3 June 2020 [2020/CLE/gen/0000], Ruling delivered on 8 December 2020, this Court dealt with the applicable principles on stay pending appeal. For present purposes, I merely reiterate them wholly at paragraphs 23 to 28.**

"[23] The starting point is that a judge has a wide discretion with regards to the grant of a stay. This is confirmed by the learned authors of *Odgers On Civil Court Actions* at page 460:

> **"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."**

[24] As to how that discretion ought be exercised in these circumstances, the court's considerations have only broadened with the developing case law, beginning, most notably, with the decision of Brett, LJ in the case of *Wilson v Church No. 2* [1879] 12 Ch.D. 454 at 459 wherein he stated:

> **"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."[Emphasis added]**

[25] This was further developed in *Linotype-Hell Finance Ltd. v Baker* [1993] 1 WLR 321 wherein 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."[Emphasis added]**

[26] So, where an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application if the defendant 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 requires evidence and not bare assertions.

[27] Some additional principles that the Court should be guided by in considering an application for a stay pending an appeal is outlined in the case of *Hammond Suddards Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065 at para 22 *(per Clarke JL and Wall J):*

> **"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?"**

[28] Guidance was also given by the English Court of Appeal in *Leicester Circuits Ltd v Coates Brothers plc* [2002] EWCA Civ 474. 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."**

[30] In his Submissions, the Plaintiff relied on these same principles of law. He sought a stay relative to the costs order on the ground that his proposed appeal has a reasonable prospect of success. He did not allege nor provide any evidence that without a stay, he will be financially crippled or ruined.

[31] This Court, having concluded that the proposed grounds of appeal of the Plaintiff are without merit, in the exercise of my discretion, I will refuse a stay. A successful party, like the Defendants, should not be deprived in obtaining the fruits of their judgment.

Conclusion

[32] In the premises, I will dismiss the Plaintiff's Motion seeking leave to appeal and a stay of the Ruling with costs to the Defendants to be taxed if not agreed.

Dated this 12th day of February, A.D., 2021

Indra H. Charles
Justice