

COMMONWEALTH OF THE BAHAMAS

2021

IN THE SUPREME COURT

CLE/GEN/00037

Common Law & Equity Division

B E T W E E N

PATRICE FERGUSON

Plaintiff

AND

COMMONWEALTH BREWERY LIMITED

Defendant

Before The Hon. Mr. Justice Neil Brathwaite

Appearances: Obie Ferguson, Jr. for the Plaintiff
Audley Hanna, Jr. for the Defendant

Date of Hearings: 12th August, 2021
23rd August, 2021

D E C I S I O N

1. Following proceedings before the Industrial Tribunal, Vice President Fitzcharles ruled on 21st May 2021 that the plaintiff had been wrongfully dismissed, as she had been compensated as a regular line-staff employee, and not as a supervisory employee, and awarded the sum of \$20,807.50.
2. According to the evidence that is before the court, Mr. Hilbert Collie wrote to counsel for the Defendant on 17th June 2021, requesting to know “when we can expect to receive the settlement cheque, or will the case be appealed by you which you have six weeks to do so we can advise our client accordingly.”
3. On 1st July 2021 counsel for the defendant confirmed that he had been instructed to appeal, and the requisite Notice of Appeal had been filed. By letter of the same date, counsel for the plaintiff had served upon the defendant a Summons and Affidavit of Hilbert Collie seeking liberty to “issue execution against the defendant, Commonwealth Brewery Limited...” Those documents, which had been filed on 24th June 2021, were accompanied by a letter from counsel seeking convenient dates for the hearing of that application.
4. Counsel for the defendant then wrote to counsel for the plaintiff on 2nd July 2021, noting that an appeal was extant, and requesting that no further steps be taken until the determination of the appeal, and indicating that in the absence of an agreement, a formal application for a stay would be made. There is also before the court evidence that the Record of Appeal has been settled, and the bond paid. The defendant has therefore done all that is necessary to prepare the appeal for hearing. In fact, I take judicial notice of the fact that the appeal is already listed for hearing on the Court of Appeal’s cause list.
5. Having not received an agreement to take no further steps, an application was filed by the Defendant/Applicant seeking the following relief:
 1. There be a stay of the execution of the ruling of Madam Vice President of the Industrial Tribunal Madam Simone Fitzcharles rendered on the 21st day of May, AD, 2021 (the Ruling) pending the determination of the appeal of the Ruling currently before the Court of Appeal which was filed on behalf of the Defendant on the 1st day of July, AD, 2021 (the Appeal); and/or

2. There be a stay of the instant proceedings pending the outcome of the Appeal.

Submissions of the Defendant/Applicant

6. In support of the application for a stay, the defendant points to the provisions of Order 31A Rule 18(2)(d) of the Rules of the Supreme Court, which provides as follows: (2) Except where these Rules provide otherwise, the Court may —
(d) stay the whole or part of any proceedings generally or until a specified date or event;
7. The defendant also points to Order 45 Rule 11 of the Rules of the Supreme Court, which provides that **“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.”** The defendant submits that the filing of the Notice of Appeal is a matter which has occurred since the date of the Ruling.
8. The defendant relies on the recent decision of the Court of Appeal in **Turtle Creek Investments Limited v Daybreak Holdings Limited (SCCivApp No. 234 of 2018)** where the following principles applicable to applications for stays pending appeal are set out at paragraph 10: **“This court recently considered an appeal against the refusal of application for stay of proceedings after judgment in the Supreme Court. In Esley Hanna v Bradly Hanna 5 SCCivApp No. 182 of 2017 [Delivered 7 August 2018] in a judgment delivered by Madam Justice Crane-Scott we said at paragraph 11 on page 5: “Section 12 of the Court of Appeal Act mirrors the provisions of O 59. r. 13 of the former English Rules of the Supreme Court 1965. It is therefore useful to advert to the following portions of Practice Note 59/13/1 found at pages 1076- 1077 of Volume 1 of the 1999 Edition of The English Supreme Court Practice: “Stay of execution or of proceedings pending appeal ...Neither the court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. The Court does not “make a practice of depriving a successful**

litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled,” pending an appeal (The Annot Lyle (1886) 11 P.D. 114, p.116, C.A.; Monk v. Bartram [1891] 1 Q. B. 346); and this applies not merely to execution but to the prosecution of proceedings under the judgment or order appealed from - for example, inquiries (Shaw v. Holland [1900] 2 Ch. 305) or an account of profits in a passing-off action (Coleman & Co. v. Smith & Co. Ltd. [1911] 2 Ch. 572) or the trial of issues of fact under a judgment on a preliminary question of law (Re Palmer’s Trade Mark (1883) 22 Ch. D. 88). But the court is likely to grant a stay where the appeal would otherwise be rendered nugatory (Wilson v. Church (No.2) (1879) 12 Ch. D. 454, pp. 458, 459, C.A.), or the appellant would suffer loss which could not be compensated in damages. The question whether or not to grant a stay is entirely in the discretion of the court. (Becker v. Earl’s Court Ltd. (1911) 56 S.J. 206; The Retata [1897] P. 118, p. 132; Att.-Gen. v. Emerson (1889) 24 Q.B.D. 56, pp. 58, 59) and the Court will grant it where the special circumstances of the case so require..... 6 “Where the appeal is against an award of damages, the long established practice is that a stay will normally be granted only where the appellant satisfies the court that, if the damages are paid, then there will be no reasonable prospect of his recovering them in the event of the appeal succeeding (Atkins v. G.W. Ry. (1886) 2 T.L.R. 400, following Barker v. Lavery (1885) 14 Q.B.D. 769 C.A.;.....Nowadays the court may be prepared (provided that the appeal has sufficient merit) to grant a stay, even where that test is not satisfied, if 6 enforcement of the money judgment under appeal would result in the appellant’s house being sold or his business being closed down. But if such a stay is granted the court should impose terms which (so far as possible) ensure that the respondent is paid without delay, if the appeal fails, and that appellant is prevented from depleting his assets in the meantime, except for any and necessary expenditure. This approach was endorsed in Linotype-Hell Finance Ltd v. Baker [1992] 4 All E.R. 87 (Straughton L.J., sitting as a single Lord Justice). It was also endorsed in Winchester Cigarette Machinery Ltd v. Payne (No. 2) (1993) The Times, December 15, but the Court made it clear that a stay should only be granted where there are good reasons for departing from the starting principle that the successful party should not be deprived of the fruits of the judgment in his favour. The Court also emphasized that indications in past cases do not fetter the scope of the Court’s discretion.” [Emphasis ours]

9. The Defendant/Applicant accepts that a successful litigant should not be deprived of the fruits of their judgment, but submits that there is no such intention in this case, and that this principle is not determinative of the issue. They further submit that in the instant case, the amount awarded is approximately half the annual salary of the Plaintiff at the time of her dismissal in 2019, and that as such the Defendant/Applicant would be unable to readily recover the sums awarded, should the appeal be allowed. Conversely, as an established company, the Defendant/Applicant would have no difficulty satisfying the award if it is ultimately upheld by the Court of Appeal, and suggests that further proceedings for enforcement would not be required.
10. Finally, the Defendant/Applicant submits that the appeal has merit, as, in their view, there is clear authority which is contrary to a material finding by the learned Vice President.

Submissions of the Plaintiff/Respondent

11. On behalf of the Plaintiff/Respondent, Mr. Ferguson submits that the application before the court is for conversion, and not for execution, which would only come after the judgment is converted, and which would require an application pursuant to Order 45 of the Rules of the Supreme Court, which has not been made. He therefore submits that the application for a stay is premature. Mr. Ferguson further submits that the Tribunal is not a court, and therefore its decision cannot be stayed in the same manner as the decision of a Court.

Legal Analysis

12. In applying the law to the facts of this matter, I accept that I have jurisdiction to stay the proceedings, both under Order 31A Rule 18(2)(d), and under Order 45 Rule 11. While Mr. Ferguson has submitted that there is no decision of a court to be stayed, it is my view that this contention does not really assist, as, even if the view is taken that the Ruling of the Industrial Tribunal is not a judgment or order, the Court would still have the power to stay the application for conversion, without which the Ruling is unenforceable.
13. What is also clear is that, in considering whether to grant the stay, the Court must have regard to the principles laid down by authority with

respect to how that discretion should be exercised. The power to stay pursuant to Order 31A Rule 18 is wide, but it must be exercised within the context of the facts before the court. Likewise, the power to stay pursuant to Order 45 is also wide, but must also be so circumscribed.

14. The most important fact relevant to this exercise is that an appeal has been filed. The court must therefore be guided by the principles relevant to the imposition of a stay pending an appeal. Those principles have been comprehensively set out in the Court of Appeal decision of **Turtle Creek Investments Limited** excerpted above. It is clear from that authority, which cites the previous Court of Appeal decision of **Esley Hanna v Bradly Hanna SCCivApp No. 182 of 2017**, that “ **The Court does not “make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled,”** pending an appeal.” Further on the Court said “**But the court is likely to grant a stay where the appeal would otherwise be rendered nugatory (Wilson v Church (No. 2) (1879) 12 Ch. D. 454, pp 458, 459, C.A.), or the appellant would suffer loss which could not be compensated in damages.**” Further still, the Court says “**Where the appeal is against an award of damages, the long established practice is that a stay will normally be granted only where the appellant satisfies the court that, if the damages are paid, then there will be no reasonable prospect of his recovering them in the event of the appeal succeeding.**”
15. On the question of the recoverability of the damages, if paid, the Defendant/Applicant submits that the Plaintiff/Respondent earned a salary of \$41,615.08 per annum at the time of her discharge in June 2019, which was not indicative of someone who would be in a position to readily repay the sum of \$20,897.50 should the appeal be determined against her. This is the only evidence in support of the contention that the damages would not be reasonably recoverable if paid.
16. While the prospects of success seem to be good, I accept and apply the finding of the Court of Appeal in **Turtle Creek Investments Limited v Daybreak Holdings Limited SCCivApp No. 234 of 2018** at paragraph 15, where the court endorses the principle that “**a stay should only be granted where there are good reasons for departing from the starting principle that the successful party should not be deprived of the fruits of the judgment in his favour**”.

17. In the instant case, in order for me to stay these proceedings, I would have to be satisfied that the damages would not be reasonably recoverable, and that the appeal would be rendered nugatory, in the sense that the appeal would be futile. Clearly in a matter involving a money judgment, the more important question is whether the damages would be reasonably recoverable, as, as long as they could reasonably be recovered, an appeal would not be rendered nugatory. It is also important to note that the authority uses the term "reasonably recoverable". To my mind this recognizes that some effort may be involved.
18. On the facts of this case, I am not satisfied that the fact that the damages amount to approximately half the salary of the Plaintiff/Defendant as of 2019, without more, is sufficient to satisfy the test of whether the damages would be reasonably recoverable. I am also not satisfied that there are any special circumstances which would warrant the granting of a stay in this matter. I therefore decline to stay the execution of the Ruling, and the application for conversion.
19. The Plaintiff/Defendant is entitled to the costs of this application.

Dated this 15th day of October, A.D., 2021.



Neil Brathwaite
Justice