

**COMMONWEALTH OF THE BAHAMAS**

**2021**

**IN THE SUPREME COURT**

**CLE/GEN/00021**

**Common Law Equity Division**

**B E T W E E N**

**PEGGY SWEETING-COOPER**

**Plaintiff**

**AND**

**AIRPORT AUTHORITY**

**Defendant**

**Before The Hon. Mr. Justice Neil Brathwaite**

Appearances: Obie Ferguson, Jr. for the Plaintiff

Lakeisha Hanna for the Defendant

Date of Hearings: 14<sup>th</sup> July, 2021

26<sup>th</sup> July, 2021

**DECISION**

1. Following proceedings before the Industrial Tribunal, Vice President Fitzcharles ruled on 9<sup>th</sup> April 2021 that the plaintiff had been wrongfully dismissed, and awarded the sum of \$32,500.00. On 7<sup>th</sup> May 2021 an Originating Summons was filed in the Supreme Court, for leave to issue execution against the Defendant pursuant to section 61 of the Industrial Relations (Amendment) Act.
2. An appeal against the decision of the Industrial Tribunal was filed in the Court of Appeal on 21st May, 2021. On the same date, the Defendant applied by Summons for the following relief: “An Order that the Originating Summons filed herein on the 7<sup>th</sup> day of May, A.D., 2021 be stayed pending determination of the Notice of Appeal filed in the Court of Appeal on the 21<sup>st</sup> day of May, A.D., 2021 relative to this action.”
3. The application for a stay is supported by the affidavit of Sandra Fountain, to which are exhibited the ruling of the Industrial Tribunal, and the Notice of Appeal. In that affidavit, Ms. Fountain avers that the record of appeal has been settled, and was to be filed by 23<sup>rd</sup> July, 2021, with a bond of \$2500.00 to be paid by the same date.
4. At paragraph 7 of that affidavit, the affiant says as follows: “Moreover, a refusal by the Court to stay the enforcement of the Judgment will cause great prejudice to the Defendant, (which will outweigh that of the Plaintiff), as the Defendant will be required to compensate the Plaintiff and if the Appeal is successful, the Defendant will be unable to recover its funds from the Plaintiff. If the Appeal is unsuccessful, however, there will be no injustice done to the Plaintiff as the Defendant is able to pay any Judgment awarded and the Plaintiff will be entitled to interest on the sums paid.”
5. At paragraph 8 the affiant avers that “the Defendant has a good prospect of success in the Appeal as the grounds of appeal are sound, specific, and clearly demonstrate that the Vice President erred in fact and law in her Decision.”

## Submissions of the Defendant

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 cites the authority of Wilson v Church No. 2 [1879] 12 Ch.D. 454, where at 459, Brett LJ held as follows: *“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 it the appeal, if successful, from being nugatory.”*
7. The Defendant also cites the case of Hammond Suddards Solicitors v Agrichem International Holdings Ltd [2001] EWCA Cry 2065, where at para 22 the court said as follows: *“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 reuses 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?”*

8. The principles applicable to the issue of a stay pending appeal have been considered in the Court of Appeal in **Turtle Creek Investments Limited v Daybreak Holdings Limited** (SCCivApp No. 234 of 2018) where the following principles 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 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 submits that if the stay is refused the appeal will be rendered nugatory as the Judgment will be executed and that will be the end of the matter, and there would be no need for an appeal of the decision. It is further submitted that the Defendant will suffer injustice and will be prejudiced, as the Defendant will be required to compensate the Plaintiff and if the appeal is successful, the Defendant will be unable to recover its funds from the Plaintiff.

### **Submissions of the Plaintiff**

10. On behalf of the Plaintiff, Mr. Ferguson questions whether the court has jurisdiction to grant a stay of a decision of the Industrial Tribunal. He refers to the fact that this is in substance an application for a stay pending appeal, and suggests that a stay can only be applied to the decision of the court below,

and as the Tribunal is not a court, its decision cannot be stayed in the same manner as the decision of a court.

### Analysis

11. 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, the application being made is to stay the Plaintiff's application for conversion brought by way of Originating Summons, and not to stay the decision of the Industrial Tribunal, which is in any event unenforceable unless converted pursuant to section 61 of the Industrial Relations Act.
12. 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.
13. 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.”**

14. 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, for, as long as they could reasonably be recovered, any 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 necessary.
15. I also note the submission of the Defendant that if the stay is refused the appeal would be rendered nugatory as the judgment will be executed, and there would be no need for an appeal of the decision. In my view these conclusions do not follow, as, even if the judgment were enforced prior to the disposition of the appeal, the Defendant would still have the right to recover any damages paid if the appeal is allowed.
16. It is also important to note that there is no evidence before the court to support any contention that the damages would not be reasonably recoverable. There is merely a bare statement to that effect at paragraph 7 of the affidavit of Sandra Fountain. There is not even an averment that the plaintiff will not have the means to return the funds.
17. In this case, while I am in no way deciding the appeal, I note that the learned Vice President of the Industrial Tribunal seems to have ignored a conviction in the Magistrate’s Court, and arrived at different conclusions of fact, in support of the finding that the Plaintiff had been wrongfully dismissed. While that finding might eventually be upheld, it is my view that the prospects of success on the appeal are good. However, the test for the imposition of a stay on a matter involving a money judgment is whether the damages are

reasonably recoverable. On the facts of this case, I am not satisfied that there is any evidence that the damages, if paid, would not be reasonably recoverable. I note that the damages are substantial, and the difficulty in recovery in my view grows exponentially with the amount of the damages. However, the same could be said of any matter involving a substantial money judgment, and does not derogate from the principle that as accepted by the Court of Appeal in **Turtle Creek Investments Limited v Daybreak Holdings Limited SCCivApp No. 234 of 2018** at paragraph 15, 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**”.

18. I am not satisfied that any such good reasons have been demonstrated in this case. I therefore decline to stay the application for conversion by way of the Originating Summons.
19. The costs of this application are awarded to the Plaintiff.

Dated this 15<sup>th</sup> day of October, A.D. 2021



Neil Brathwaite  
Justice