

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT OF
Common Law & Equity Side

2011
CLE/gen/01598

**IN THE MATTER of the banking mandate entered into between the Plaintiff
and Defendants dated 2nd September, A.D. 1986**

BETWEEN:

BETTAS LIMITED

Plaintiff

AND

HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED

First Defendant

AND

**THE HONGKONG AND SHANGHAI BANKING CORPORATION
LIMITED**

(HONGKONG BRANCH)

Second Defendant

RULING

BEFORE: **The Honourable Madam Justice C.V. Hope Strachan**

Appearances: **Mrs. Tara Archer Glasgow and Mr. Audley Hanna for the
First and Second Defendants**

**Mr. Marco Turnquest and Ms. Theresa Munnings for the
Plaintiff**

Hearing Date: **3rd May, 2023**

Practice – Stay of Execution

1. HongKong and Shanghai Banking Corporation Limited (“the First Defendant”) and The Hongkong and Shanghai Banking Corporation (Hongkong Branch) the Second Defendant filed a Summons on 27th April, 2023 seeking a Stay of Execution pending determination of the Defendant’s appeal of the Judgment of Senior Justice Indra Charles dated 5th April, 2023.
2. A Certificate of Urgency was received by the court on 28th April, 2023 requesting that the said Summons be heard on Wednesday 3rd May, 2023.
3. The terms of the Justice Charles’ Order upon judgment are as follows:
 - 1) *Adrian Kundanmal is a properly appointed director of the Plaintiff and is entitled to give instructions to the Defendants on its behalf.*
 - 2) *The Defendants shall transfer the funds in the Plaintiff’s Account numbered 567-264957, or any other account held to its order, in accordance with Adrian Kundumal’s instructions.*
 - 3) *The Defendants shall provide the Plaintiff with an account of all funds held to its order from the inception of the Account, not later than 5th day of May 2023.*
 - 4) *The Plaintiff is awarded interest on the funds held by the Defendants, from the commencement of the proceedings to the date of the Judgment, such interest to be heard and determined by a Judge in Chambers, if not agreed.*

5) The Plaintiff is awarded interest at the statutory rate of 6.25% per annum from the date of Judgment to the date of payment on the funds held to its order.

6) The Plaintiff is awarded its costs of and incidental to the Action, such costs being certified fit for Two counsel, and are to be taxed if not agreed.

4. The Defendant's application is made pursuant to:

(i) Order 45 rule 11 of the Rules of The Supreme Court 1978 ("RSC") and/or under the inherent jurisdiction of the Court that the Defendants intend to file an appeal of the said judgment in the Court of Appeal; and/or

(ii) Order 31A rule 18 (2) (d) of the Rules of the Supreme Court and/or under the inherent jurisdiction of the Court that the judgment be stayed pending a determination of the Defendants' appeal in the Court of Appeal: and/or

(iii) Section 16 (3) of the Supreme Court Act ("the SCA") and/or under the inherent jurisdiction of the Court that the Judgment be stayed pending determination of the Defendants' appeal in the Court of Appeal.

5. The Plaintiff opposes the application and both parties have submitted written submissions and have vigorously presented their respective positions at the hearing of the application.

6. There was no dispute between the parties as it relates to the applicable law regarding stays and both submitted as follows;

7. S. 16 (3) of the Supreme Court Act

“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 any person whether or not a party to the proceedings”

8. Order 31 A rule 18 (2) (d) of the RSC

“Except where these Rules provide otherwise, the Court may stay the whole or part of any proceedings generally or until a specified date or event.”

9. Order 45 rule 11 of the RSC:

“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 judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just.”

10. Cases submitted by the Applicants and the Respondents are informative of the approach which the court must take when considering the grant of a stay.

In relying upon Charles J’s ruling in the case of *Opac Bahamas Ltd v Duane Bennett Parham et al 2019/CLE/gen/00127* the Plaintiff emphasized;

““But the court is likely to grant a stay where the appeal would otherwise be rendered nugatory or the appellant would suffer loss which could not be compensated in damages. The Question whether or not to grant a stay is entirely at the discretion of the court.”

Then in further support of the established principle that the grant of a stay is in the discretion of the court the Applicant submitted the case of *City Services Limited v Aes Ocean Cay Limited [2012] 1 BHS J No. 85 quoting Evans J. at paragraphs 15 and 16;*

11. *' The general rule is that an appeal, even an undoubted right of appeal, does not operate as a stay of execution. There is, therefore, no right to a stay of execution and whether or not to grant a stay of execution is purely within the discretion of the court. However, the authorities are clear that discretion is to be exercised so as to avoid injustice and to prevent the appeal, if successful, from being nugatory.*

The case of *Hammond Suddards Solicitors v Agrichem International Holdings Ltd. [2001] EWCA Civ 2065* was submitted by the Defendants as to the exercise of the Court's discretion;

“ 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.....”

“ 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?”

The pertinent considerations as advanced by the Defendant were that:

A refusal of a stay may render the appeal nugatory and as such have provided in the Affidavit of “Taylor” various factors as follows;

- i. Plaintiff is resident out of the Jurisdiction – in Liberia.
- ii. That the jurisdictional issues that justified the granting of a security for costs order remain and are equally relevant to this instant application.
- iii. That the defendants would be unprotected if the Plaintiff went off.
- iv. That the absence of a successful litigant in the jurisdiction is a crucial element that the court must consider in determining the risk of injustice to one or other or both parties if it grants or refuses a stay.
- v. There being no legislation which offers reciprocal acknowledgement of judgments between Liberia and The Bahamas therefor unless a stay is granted pending a determination of an appeal should they be successful the return of the funds would be highly impossible and create immense injustice to the Defendant.
- vi. That they would be unable to recover the sensitive financial information distributed to the Plaintiff.

- vii. That the stay would not cause prejudice to the Plaintiff as he had previously testified that he was not in need of the money.
- viii. That the Plaintiff bears no risk concerning its ability to enforce, should the appeal prove to be unsuccessful since the subject funds remain vested in the account of Bettas.
- ix. To the extent that this court considers that the appeal has merit the Defendants submit that this would be proper consideration for the grant of the stay.

12. Based on the aforesaid the Defendants concluded inter alia that the Plaintiff would take active steps to enforce the judgment despite knowledge of the Defendant's intention to appeal and to seek a stay of execution of the same. In the circumstances, they deemed it extremely urgent that they be granted a stay pending the determination of the appeal. They emphasized that there is a risk of irreparable harm and the rendering nugatory of the appeal.

13. ***The pertinent considerations as advanced by the Plaintiff*** are as follows:

The argument put forward by the Applicant that to disclose information potentially to persons who are not authorized to instruct them will irretrievably destroy the substratum of their appeal and render the appeal nugatory does not hold water because:

- i. Firstly, the Defendants do not own the funds in the Plaintiffs account and are obligated to repay the same to the Plaintiff upon demand.
- ii. Secondly since the account was set up over almost Forty (40) years ago, there has not been a claim by any third party to the funds.
- iii. Thirdly, the Defendants invited the Plaintiff to apply to the court for a court order to establish AK's (the Plaintiff's) authority, which it did.

- iv. Fourthly, if the Defendants were to pay the funds out or disclose the account details to AK (the Plaintiff) it would be doing so pursuant to a court order and could not be sued for this. Given this there is no basis in fact or law for the Defendants to allege that they would suffer serious damage for complying with the judgment Order.
- v. Fifthly, The Defendants have produced no evidence of the claim by them that since the Plaintiff is a foreign company once the money has been paid away it could not recover the same.
- vi. Sixthly, The Defendants suggestion that the assessment of interest in the matter should have no bearing on whether the stay should be granted.
- vii. Seventhly, the suggestion that the Plaintiff will not suffer any prejudice by a stay does not follow because he is being deprived of the ability to invest tens of millions of Dollars.

The Plaintiff also contended that the failure to include in the grounds of Appeal a challenge to the Order given by Charles J, that Adrian Kandunmal was to be the proper person to give directions to the Defendants renders it meritless. The Plaintiff relies on the case of *Lake v Lake [1955] 2 ALL E.R. 538* and *Cie Noga d'Impotation et d'Exportation SA v Australia and New Zealand Banking Group Ltd and others; Cie Noga d'Impotation et d'Exportation SA v Government of the Russian Federation and others [2003] 1 WLR 307* to support this contention. However Lake may be distinguished as peculiar on its facts. *See Curtis v London Rent Assessment Committee and othes [1997] 4 All E R 842 -*

- viii. The Plaintiff asks for the dismissal of the application.

HELD:

The written submissions made in relation to the application were augmented by both parties' verbal arguments. Those arguments were essentially directed towards whether the draft appeal in light of the ruling demonstrates good and sufficient grounds for launching an appeal and/or the chances of success of such appeal.

While the information and arguments emanating from the respective positions were helpful in informing the background and basis for the application, those particular arguments which delved into the details of the factual circumstances of the case and indeed the other matters mentioned which culminated in the subject ruling were not particularly pertinent to the application one way or the other.

Accepting that based on the statute provisions outlined above and the cases commended by the Applicant and the Respondent it is clear that this court has the discretion to grant the stay of execution.

In exercise of that discretion as prescribed in the *Hammond Suddards Solicitors v Agrichem International holdings Ltd. [2001] EWCA Civ 2065* this court will have to balance the respective interests of the parties, the risk of injustice if the stay is granted or not as opposed to not being able to recover money.

It is apparent according to paragraph 3 of the Judgment of Charles J. dated 5th April, 2023 that the Defendants are mandated to provide the Plaintiff with an account of all the funds held to its order from the inception of the account no later than 5th May 2023. Clearly given that this ruling is being delivered this 4th May 2023 the matter is urgent and justifies the application made by the Defendants after the Plaintiffs refused to agree to the stay.

The affidavit evidence in support of the Defendants ('The Taylor Affidavit') together with the draft Appeal attached thereto demonstrates that if the *order for the funds to be transferred and all of the account information is given prior to the hearing of the appeal would render the appeal nugatory.*

When balancing this against the contentions made by the Plaintiff in opposition 1-7 to the application while these are relevant and in most instances a fair assessment of the factual issues for consideration, it does not extinguish the fact that once Charles J's order is executed success of the Defendants appeal will be rendered nugatory.

In the premises the Court grants the Defendants application for a Stay of Execution of the Order of Senior Justice Indra Charles dated 5th April, 2023 and filed 24th April, 2023 pending the outcome of the appeal.

Costs of the application to the Defendants.

A handwritten signature in black ink, appearing to read 'Strachan J.', is written above a solid horizontal line.

STRACHAN J.

Dated the 3rd Day of May, A.D., 2023