

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2018/CLE/gen/FP/00102

B E T W E E N

ALPHA AVIATION LIMITED

Claimant

FRED KAISER

Second Claimant

AND

SCOTT FERGUSON

Defendant

Before: The Honourable Justice Andrew Forbes

Appearances: Jacy Whittaker, for the Defendant

RULING ON STAY APPLICATION

Forbes, J

INTRODUCTION

[1.] This application before the Court is for leave to appeal and a stay of this Court's decision made on 12 June, 2024. In which the Court disallowed relief from sanctions pursuant to Rule 26.8; further, in its inherent jurisdiction struck the Amended Defence and granted summary judgment to the Claimants. Moreover, the Court denied costs to either of the parties and held the parties to bear their own costs.

[2.] This application for Stay of the Judgement was filed on 18 June, 2024. However, the Affidavit in Support of this application was not filed until 1 August, 2024.

[3.] The grounds for appeal, in part, are as follows:

- a. That the Defendant Notice of Appeal against the said Judgment of this Court, raising substantial and arguable points of law;
- b. The appeal has a good prospect of success;
- c. If the stay is not granted, the Defendant will suffer irreparable harm that cannot be adequately compensated by damages, as the Judgment would take immediate effect, causing significant and undue hardship;
- d. Part 43.12 of the Civil Procedure Rules allows for a stay of execution of the judgment or order or other relief;
- e. Part 26.1(2)(q) provides that the Court may stay the whole or part of any proceedings generally or until a specified date or event;
- f. The balance of convenience favours granting the stay, as the Claimant will not suffer substantial prejudice if the stay is granted, while the Defendant faces serious consequences if the stay is not granted;
- g. The Defendant has promptly applied for this stay pending appeal, demonstrating a proactive approach in addressing the matter;

BACKGROUND

[4.] The brief background to this matter is that on 1 July 2022, the Claimants filed an Amended Specially Endorsed Writ and instituted this action for Breach of Agreement. The Defendant filed an Amended Defence on 5 July 2022. On 12 May 2023, the Claimants

completed the case management questionnaire to move to case management. On the 9 August, 2023 the Case Management Order was perfected.

[5.] On the 9 August 2023 a Case Management Conference Order was filed which stated:
The parties shall file their witness statements and exchange them on or before January 17th, 2024 ... that failure to serve witness statements on the stipulated date will attract the sanctions set out in Rule 29 .11. Specifically, a party may not call any witness whose witness statement has not been filed at the time specified unless the Court otherwise orders.

[6.] Further, on 12 February, 2024 Defendant filed a Notice of Evidential Objection ("First Application") objecting to the use of (i) a Promissory Note in the sum of \$175,000 dated 3 September, 2023; (ii) a Promissory Note in the sum of \$50,000 dated 4 September, 2023; (iii) a Letter to Mr. Scott Ferguson from Aisha Z. Stuart-Smith dated 14 February, 2023 and (iv) a Letter to Mr. Scott Ferguson from Aisha Z. Stuart-Smith dated 10 April, 2019. The First Application was supported by the Affidavit of Machel Hepburn filed on 12 February, 2024.

[7.] Claimants' Counsel sought relief from sanctions and filed an application pursuant to Part 26.8 and 26.9 of the CPR on 18 January, 2023 and subsequently an Amended Notice of Hearing on 21 February 2024, seeking Summary Judgment pursuant to Part 15.2(b) and an Order to strike out the Defence of the Defendant and, in the alternative to summary judgment, Judgement in Default of Defence pursuant to Part 12.5 of the CPR. The Applications are supported by the Affidavit of Mamique D. C. Knowles filed on 21 February, 2024.

[8.] In a written decision the Court granted judgment as described in paragraph 1 above.

EVIDENCE

[9.] The evidence in support of this application is the Affidavit of Scott Ferguson states in part, that:

- a. He is the Defendant in the matter;
- b. The Affidavit is made in support of the Notice of Application seeking an Order to Stay the Execution of this Court made 12 June, 2024 pursuant to Part 43.12 and Part 26.1(2)(q) of the Supreme Court Civil Procedure Rules;
- c. On 1 July, 2024 the Claimants filed their Specially Endorsed Writ for breach of contract with the Defendant filing a Defence;
- d. The matter progressed to Case Management Conference where among other things the parties were directed to file and exchange witness statements on or before 17 January, 2024 failing which would result in sanctions;

- e. Issues arose with compliance and both the Claimants and Defence made certain filings. Amongst the filings the Claimants filed an application for Summary Judgment and to strike out his Defence due to it not being sufficiently particularized;
- f. In response the Court ruled that the Amended Defence entered on his behalf did not particularize the defences raised and should be struck out;
- g. He has since filed an appeal in the Court of Appeal and believes he has a good prospect of success;
- h. Should the stay of the execution of the Judgment not be granted, he will suffer irreparable harm that an award of damages cannot later compensate. The Claimants have taken steps to suggest that they will seek to enforce the said judgment against he and his businesses;
- i. The Order sought in the Notice of Application currently before this court are of grave importance as the Claimants have also sought to enforce the judgement "*forthwith*" and that this was not the order of the Court;
- j. Pursuant to Part 43.12 and 26.1(2)(q) of the Civil Procedure Rules, this Court has the jurisdiction to stay the execution of the judgment and order a stay of proceedings /pending a decision on the issues raised on appeal.
- k. A stay of execution and stay of proceedings will not cause the Claimants to suffer any substantial prejudice as the risk of harm to be suffered rested with him; and
- l. That the Court grants the Orders sought for a stay of execution and bar the Claimants from taking further steps to enforce the Judgement entered on 12 June, 2024.

[10.] Neither Counsel in this action laid over submissions to this Court for its consideration.

LAW

[11.] Part 26.1 (2) (q) empowers the Court to stay the whole or part of any proceedings. Specifically, it states:

(2) Except where these rules provide otherwise, the Court may —

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

[12.] This exactly mirrors the previous Rules of the Supreme Court Order 31A r. 18(2)(d) which provide:

“(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;”

[13.] Moreover, 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:

an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below.”

[14.] Further, Part 43.12 gives parties whom a judgment or order has been made, the right to seek a stay of execution of the judgment, order or other relief. Specifically, Part 43.12 states:

Without prejudice to rule 48.1, 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.

[15.] Further, when speaking to the Courts discretionary power to grant a stay, Halsbury’s Laws of England 4th Edition, Volume 17 and paragraph 455 states:

The court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will as a rule, only grant a stay if there are special circumstances, which must be deposed to on an affidavit unless the application is made at the hearing.

[16.] The determination to grant a stay is completely at the discretion of the Court. As held in the case of **Linotype-Hell Finance Ltd. v Baker** [1993] 1 WLR 321 at page 323, *Staughton L.J.* opined:

“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.”

[17.] A stay will only be granted in special circumstances, so as not to deny the successful Plaintiff of the fruits of his victory (see **Smith v. The Bahamas Real Estate Association** [2015] 2 BHS J No. 8; **Linotype-Hall supra**; and **Citibank NA v. McDonald** [2004] BHS J. No. 452).

[18.] Therefore, if there is a risk of great injury of being ruined or injured seriously the Court may exercise its discretion.

APPLICATION

[19.] With consideration to the aforementioned law and pleadings, the Court refuses the application for stay of execution on the following grounds:

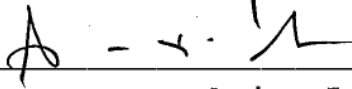
- a. The Defendant has not satisfied this Court that the Defendant would be injured seriously or ruined if a stay is not granted.
- b. Rather, for the reasons stated in paragraphs 2.3 of the Notice of Application the Defendant may have interruptions in business or may be forced to liquidate certain assets but has not demonstrated to the Court that he or his business would be put in a position of substantial hardship, as the Claimant mentioned 'businesses' and is a man of means he has not demonstrated to this Court how (beyond his own words) hardship would befall him; and
- c. To grant a stay absent of the required special circumstances would result in a denial of the Plaintiff their award.

DISPOSITION

[20.] Application for stay of execution and stay of proceedings is denied.

[21.] No order as to cost.

Dated the 28th November, 2024



Andrew Forbes
Justice of the Supreme Court