

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2015/CLE/gen/00341

IN THE MATTER of the trusts of the Deed of Settlement dated the 30 June 1992 and designated as the Glenfinnan Settlement AND the trusts of the Deed of Settlement dated 23 March 2009 and designated the Moray Settlement AND the trusts of the Deeds of Settlement dated 20 December 2006 and designated the Emo Settlement, the Hewish Settlement and the Came Settlement

BETWEEN

ASHLEY DAWSON-DAMER

Plaintiff

AND

(1) GRAMPIAN TRUST COMPANY LIMITED

(2) LYNDHURST LIMITED

Defendants

Before Hon. Chief Justice Sir Ian R. Winder

Richard Wilson KC with John Minns (Instructed by Graham Thompson) on behalf of the Plaintiff

Sean Moree KC and Vanessa Smith (Instructed by McKinney Bancroft & Hughes) for the First Defendant

23 April 2024

DECISION ON APPLICATION FOR A STAY

WINDER, CJ

This is my decision on the Plaintiff's (Ashley's) application of a stay of the taxation of the costs arising out of the proceedings in this action for which judgment was given on 17 January 2022. Ashley seeks that the costs be stayed pending the determination of her appeal to the Privy Council.

[1.] Ashley commenced this action on 20 March 2015 seeking *inter alia* to set aside appointments dated 21 December 2006 and 23 March 2009 made by the First Defendant (Grampian), as trustee of the Glenfinnan Settlement. Ashley alleged that the appointments were made in breach of trust and should be set aside.

[2.] Following a lengthy trial, this Court, on 17 January 2022 dismissed Ashley's claim. Subsequently, on 18 October 2022 Ashley was ordered to pay Grampian's trial costs.

[3.] Ashley appealed the Supreme Court judgment against her to the Court of Appeal and on 3 May 2023 the Court of Appeal dismissed the appeal. The Court of Appeal granted Ashley conditional leave to appeal to the Judicial Committee of the Privy Council on 10 October 2023. The appeal is pending before the Privy Council.

[4.] Ashley identifies the principles to be applied for an application for a stay of execution as the following:

- (1) The Court may stay not only the enforcement of an order but also the progress of proceedings in respect of the judgment or order appealed.
- (2) It is in the discretion of the Court whether or not to grant a stay taking into account all the circumstances of the case.
- (3) Although a stay is the exception the Court will grant a stay where there "are good reasons for doing so" and the "special circumstances of the case so require".
- (4) One such "good reason" or "special circumstance" is that the appellant would face irremediable prejudice or damage by suffering potential irrecoverable loss. In *Rawlinson*

& *Hunter Trustees SA v ITG Limited* [2015] EWHC 1924 (Ch) the English High Court refused to order an immediate assessment of costs when there were doubts about the successful party's solvency.

- (5) The Court must balance the risk of injustice to one or other or both parties if it grants or refuses a stay. It must make an order which best accords with the interests of justice, which is achieved by balancing the alternatives to decide which is less likely to cause injustice.
- (6) If there is doubt in where the interest of justice lie the Court can have regard to the merits of the appeal. However, provided the appeal has "some prospects of success", then the merits of the appeal should not determine a stay application. This is not a high bar. ... provided it cannot be said that the appeal is unarguable then the Court should look to balance the risk of injustice in deciding whether to grant a stay.

[5.] The principles relative to the grant of a stay pending appeal in this jurisdiction were helpfully set out by *Sir Michael Barnett P* in the case of **Finlayson et al v Caterpillar Financial Service Corporation** SCCivApp. No 99 of 2022. According to Sir Michael Barnett P:

13. In *Nygaard v Smith et al*. SCCivApp. No. 184 of 2019 Jones, JA set out the jurisprudence with respect to an application for stay pending appeal. He said:

"12. The relevant principles governing a stay pending appeal is set out in *Linotype-Hell Finance Ltd. v. Baker* (1992) 4 All ER 887, at p. 888 where Staughton LJ said:

'It seems to me that, if a 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.'

13. More recently in *Point West Trust London Ltd v Rothschild Trust (Bermuda)* [2012] EWCA Civ 884 Lord Justice Patten gave a further refinement at para 3:

'The grant or not of a stay of execution pending appeal is, of course, an exercise of some discretion vested in the court, but it has to be exercised on established principles. The authorities indicate that the mere fact that permission has been granted for an appeal is not sufficient of itself to justify the imposition of a stay in relation to the original judgment. The parties seeking the stay must be able to demonstrate that if the stay is not granted it will suffer serious – perhaps irremediable -damage as a consequence. If it is able to demonstrate that then that has to be set against the effect on the successful party below in not being able to enforce its judgment pending the appeal.'

14. These general principles have been applied in our jurisdiction in *Bahamas Real Estate Association v. George Smith* SCCivApp No. 109 of 2015, where Isaacs J.A in delivering the judgment of the court said at paras 11 and 12:

“11. ...the court should ensure that in the event the appealing party succeeds his judgment on appeal is not rendered nugatory.

12. Further guidance as to matters the Court must take into account may be derived from the authorities. Some have been helpfully set out in the appellant's submissions, for example,

- a) whether the appellant is entitled to appeal as of right; see also *Wilson v. Church* (No.2) (1879) 12 Ch 454;
- b) whether the appellant has an arguable case; see *Mandeer Holidays Ltd v Civil Aviation Authority* Official Transcripts (1980-1989);
- c) whether the absence of the stay would render a successful appeal nugatory; See *City Services Limited v. AES Ocean Cay Limited* [2012] 1 BHS J. No. 85 at para. 15 at TAB 8; see also *Wilson v. Church* supra;
- d) whether there is a risk of injustice to one or other of the parties if it grants or refuses a stay; see *Hammond Suddards Solicitors v Agrichem Holdings Ltd* [2001] EWCA Civ 2065; and
- e) whether the appellant has given sufficient evidence by affidavit as to why a successful appeal could be rendered nugatory; see *City Services* supra at para. 16.”

[6.] The position in *Finlayson et al v Caterpillar Financial Service Corporation* was confirmed in the Court of Appeal in this case: *Dawson Damer v Grampian et al* SCCivApp. No 30 of 2022.

[7.] I therefore accepted Ashley summary of these principles as follows:

“the Court will not exercise its discretion to stay a costs order (or other money judgment) pending appeal unless –

9.1 The appeal has a real prospect of success; and

9.2 The appellant can show by evidence that if the stay is not granted and the appeal succeeds, they will have no real prospect of recovering the money paid to the respondent, or the appeal judgment will be rendered nugatory, or they will suffer some other serious (perhaps irremediable) damage: see *Finlayson v. Caterpillar* SCCivApp No. 99 of 2022 (26 April 2023) at [13-16] ...”

“The Court will consider the risk of injustice to both parties if a stay is or is not granted, but will expect the applicant to show exceptional circumstances warranting a stay. The mere fact that time and money may have been wasted in the taxation if the appeal later succeeds is not, without more, a reason for granting a stay: see *Murphy v. Hot Pancakes* at [12-14], [21] and [37]; see also *Stewart v. Hamersmith-Stewart* SCCivApp Nos. 108 & 132 of 2022 (10 August 2023) at [5-8].”

[8.] Ashley says that a stay should be granted on the basis that there is the real risk of substantial irrecoverable wasted costs and judicial resources if the taxation process goes ahead. Ashley also says that even if a stay were not to be ordered, a taxation of this size (involving a hearing of 15-20 days) may not conclude until next year. By contrast, leave to appeal to the Privy Council has been granted and it may be anticipated that the Privy Council appeal will be heard at the end of 2024 or in early 2025. There is therefore, she says, no commensurate irremediable prejudice to Grampian in staying the taxation process for the relatively modest period necessary for the final appeal to be determined.¹

[9.] Further, Ashley says² that where there is a possibility that the outcome of an appeal may result in an expensive and lengthy taxation process being aborted, that constitutes “good reason” for staying the taxation proceedings pending the outcome of the appeal, since judicial (and public policy) is strongly in favour of not using valuable and scarce judicial resources, or causing parties to incur substantial costs, on potentially pointless proceedings.

[10.] Respectfully, I am not satisfied that this is an appropriate circumstance for the grant of a stay.

[11.] This is the third application by Ashley seeking to stay the execution of the decision dismissing her breach of trust claim. During the costs hearing following the decision dismissing her breach of trust claim, Ashley argued that the “*taxation of all costs orders should be stayed*”

¹ See paragraph 16 of Ashley Skeleton Argument

² See paragraph 19 of Ashley’s Skeleton Argument

pending determination of the appeal process.” No stay of the taxation of the costs was granted and there was no appeal against that decision.

[12.] In the course of Ashley’s application for leave to appeal to the Privy Council, as of right, she requested a stay of the taxation of the costs. It appears that Ashley did not pursue the application to stay the taxation of the Supreme Court costs, only the costs in the Court of Appeal, notwithstanding that her notice of motion referred to a “*stay of the taxation of the costs here and below*”. This is unfortunate as it has created two separate applications. The Court of Appeal refused to stay the taxation of the Court of Appeal’s costs.

[13.] In refusing the stay, the court was not satisfied that there were any special circumstances why Grampian (as the successful litigant in this Court) should not be permitted to tax its costs of the appeal. More specifically, the Court found that there is no evidence from which they could say that Ashley’s appeal has a real prospect of success or from which they could properly find her judgment (if she succeeds in the Privy Council) will be rendered nugatory or she will suffer some other irremediable damage. At paragraphs 26 and 27, the Court stated:

26. Having examined both Affidavits of Gabriel Brown filed in support of the Motion, it is clear to us that Ashley has failed to establish her case for a stay of the taxation proceedings. There is nothing in either Affidavit that shows any special circumstances why Grampian (as the successful litigant in this Court) should not be permitted to tax its costs of the appeal.
27. More specifically, there is no evidence from which we can say that Ashley’s appeal has a real prospect of success. Furthermore, there is also no evidence from which we can properly find that if the stay of the taxation proceedings is not granted and Ashley’s appeal to the Privy Council succeeds, she will have no real prospect of recovering the taxed costs paid to Grampian; or that her judgment will be rendered nugatory; or again, that she will suffer some other irremediable damage.

[14.] I am bound by the position of the Court of Appeal. The only real difference in the circumstances, present before the Court of Appeal and before me, appear to be the amounts being taxed and the effort which will be undertaken by the parties in pursuing the taxation proceedings in the Supreme Court. The parties have together filed 8 separate bills of costs in this Court. The largest bill relates to Grampian’s costs of defending Ashley’s claim up to the trial, which exceeds \$9.2 million. Estimates for the hearing of the taxation suggest that 15 days are being sought.

[15.] I share the Court of Appeal's assessment as to prospects of success and of the similar failure to even attempt to satisfy me as to Ashley's prospects of success, however low she says the bar is.

[16.] Ultimately however, I was not satisfied that Ashley would be ruined in the absence of a stay or that her situation established some exceptional circumstance warranting the departure from the normal rule that the successful party should be permitted to enforce its judgment. Concerns raised by Ashley, as to her prospects of recovering her costs, do not appear to be merited. The concern appears to be even further diminished by the evidence that the Privy Council's appeal is likely to be heard before any sums found to be owing actually become due for payment.

[17.] As the authorities suggest, the mere fact that time and money may have been wasted in the taxation if the appeal later succeeds is not, without more, a reason for granting a stay. Ashley has not, in my view, demonstrated that if the stay is not granted she will suffer serious – perhaps irreparable – damage as a consequence. And when set against the effect on Grampian's inability to enforce its judgment pending the appeal, I would not grant a stay.

Disposition

[18.] The application for a stay is refused with costs to Grampian to be assessed if not agreed.

Dated the 16th day of July 2024



Sir Ian R Winder

Chief Justice