

SAINT LUCIA

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SLUHCV 2007/0998

BETWEEN:

1st NATIONAL BANK ST. LUCIA LIMITED

CLAIMANT

AND

**(1) UNIVERSAL FISHING AND TRADING COMPANY LIMITED
(2) ALOYSIUS HYACINTH also known as AL HYACINTH
(3) PHILIPPE ZELIE**

Defendants

Appearances:

**Ms. Sardia Cenac and with her Mr. Michael Duboulay for the Claimant.
Mr. Eghan Modeste for the Second and Third Defendants.
Mrs. Shirley Lewis holding a watching brief for the Third Defendant.**

2010: NOVEMBER 24th & 30th

RULING

[1] **WILKINSON J.:** On 2nd November 2010, the Second and Third Defendants filed a notice of application seeking an order that all proceedings in the claim including the judicial sale of Parcel Number 1457B 189 be stayed. The grounds of the application were:

1. On the 29th day of October 2010, Her Ladyship the Honourable Justice Rosalyn Wilkinson Ordered that the Default Judgment dated the 30th day of March 2009, be varied by deleting the word Defendants and inserting the words Second and Third Defendants.

2. The Aforesaid Order has been appealed against.

3. By virtue of the aforesaid appeal the proceedings ought to be stayed.

The Second Defendant filed an affidavit in support of the application on 2nd November 2010, therein he said:

"1. That on the 29th day of October 2010, Her Ladyship the Honourable Justice Rosalyn Wilkinson Ordered that the Default Judgment dated the 30th day of March 2009, be varied by deleting the word Defendants and inserting the words Second and Third Defendants.

2. That I have appealed against the aforesaid order.

3. By virtue of the aforesaid appeal the proceedings in civil suit no SLUHVC2007/0998 ought to be stayed.

4. That, in the circumstances, I pray that this Honourable Court stays all proceedings in civil suit no. SLUHVC2007/0998."

The Second Defendant filed a supplemental affidavit on 16th November 2010, and it being brief it is cited in full. He said: -

"1. That I make this Affidavit as a supplemental to my Affidavit filed on the 2nd day of November 2010.

2. That Universal Fishing & Trading Company Limited was wound up on the 13th day of May 2008 by order of the Court filed on the 19th day of May 2008 and registered at the office of Deeds and Mortgages on the 27th day of May 2008 in Volume 161 A Number 197671.

3. That the Winding Up order also specified the method by which the debt owed to the Claimant is to be settled, that being the sale of the vessel.

4. That the Claimant now seeks to disregard the Winding Up order and to settle the debt by Judicial Sale of my property at Cas En Bas, Gros Islet.

5. That if my property at Cas En Bas is sold I will be financially ruined as I intend to use that property to finance my retirement.

6. That my appeal against the decision dated the 29th day of October 2010 of Her Ladyship the Honourable Justice Rosalyn Wilkinson has reasonable prospects of success.

7. That I am asking this Honourable Court that all proceedings in Civil Suit no. SLUHCV2007/1998 be stayed pending the result of my appeal.

8. That if these proceedings are not stayed it will result in a great injustice.

9. That if a stay is granted and the appeal fails then the judgment can be enforced without prejudice to the Claimant, however, if a stay is not granted and the appeal succeeds I will be unable to recover the property and will thereby be enormously prejudiced.

10. That in the circumstances, I pray that this Honourable Court stays all proceedings in civil suit no. SLUHCV2007/0998.”

[2] Counsel for the Second and Third Defendants opened his submissions by recognizing that the rules make it clear that the filing of a notice of appeal does not operate as a stay of execution and therefore an application is necessary. He submitted that it was now trite law the principles applicable to a stay and that the authorities of **Hammond Suddards Solicitors v. Agrichem International Holdings Ltd.**¹ and **Linotype-Hell Finance Ltd. v. Baker**² set out the principles on which a stay would be granted. Citing **Hammond Suddard Solicitor** he said that the essential questions were whether there is a risk of injustice to one party or the other if a stay is granted or refused, and if the stay was refused, what is the risk of a successful appeal being satisfied. These principles he said form the essence of the Second and Third Defendants’ application for a stay and this was encapsulated in the supplemental affidavit made by the Second Defendant. He asked the Court to have regard to the overriding objective and referred the Court to **Courtesy Taxi Co-operative Society Ltd. v. Lucien Joseph**³ paragraph 15.

[3] He said that if the stay was not granted and the Second Defendant’s property sold then the Second Defendant would be severely prejudiced, whereas if the stay was granted and the appeal was not successful, then the property would still be available for the Claimant to sell, and indeed with the delay, the property would appreciate in value.

[4] He referred the Court to the winding up order in **SLUHCV2008/0102 IN THE MATTER of a Petition for winding up of Universal Fishing & Trading Company Limited**. The order made 13th May 2008 states:

“ORDER ON APPLICATION FOR WINDING UP OF UNIVERSAL FISHING & TRADING COMPANY LIMITED

MADE BY: The Honourable Justice Sandra Mason Q.C.

MADE ON: The 13th day of May 2008

¹ [2001]EWCA Civ 2065

² [1993]1 W.L.R. 321

³ Saint Lucia Civil Appeal CVAP 2008/043

ENTERED: The 19th day of May 2008

Upon this matter coming up for determination without hearing pursuant to Part 11.14 of the Civil Procedure Rules 2000

AND UPON READING the Petition of ALOYSIUS HYACINTH dated the 30th day of January 2008

IT IS HEREBY ORDERED

1. That Universal Fishing & Trading Company Limited (hereinafter referred to as THE COMPANY) be wound up pursuant to section 385 of the Companies Act.
2. That the assets of THE COMPANY be sold to repay its debts, including the loan made to THE COMPANY by 1st National Bank Saint Lucia Limited.
3. That the cost(s) of the winding up be borne by THE COMPANY
4. That a copy of the order be served on Mr. Philip Zelig, the other Director and Incorporator of said company."

[5] It being customary for the applicant for a stay to either recite the grounds of his appeal in his affidavit or exhibit the notice of appeal annexed to his affidavit and no such information having been laid before the Court, I made inquiry about this information. Counsel said that he did not know why a copy of the notice of appeal was not in the high court file because he had done all that he was required to do when he filed the notice of appeal. On my inquiry as to the court stamp on the document, he responded that it bore the court of appeal stamp and the identification number of Civil Appeal No.34/2010. He said that he did not know how the Registry processed the notice of appeal filed and how matters were organized within the Registry, and so he could not account as to why the Court did not have in the high court file before it a copy of the notice of appeal. He said that on occasion when he has had to venture into the Registry to file documents himself, he has encountered junior staff and that his staff had no control over what happened behind the filing desk at the Registry. He said that he did not know whether there were two files for the matter, a high court file and an appeals court file. He knew that there was a court office and CPR 2000 rule 62.3 required the notice of appeal to be filed at the court office where judgment was entered.

[6] Counsel for the Claimant submitted that the Claimant had not been served with the notice of appeal and so was unaware of the grounds of appeal. On the issue of whether or not there was a reasonable prospect of success, it was submitted that having not had sight of the notice of appeal such could not reasonably be determined. Further, the Second and Third Defendants could not advance any ground with a reasonable prospect of success as they had obtained the only relief

that they could have obtained, the setting aside of the judgment against the First Defendant. The judgment was properly entered against the Second and Third Defendants as there had been no application to set aside the default judgment entered against them, and by virtue of article 1043 of the Civil Code, they could not plead and avail themselves of the defences which are only open to the First Defendant. Counsel also referred to the principles set out in **Marie Makhoul v. Cecily Foster**⁴ and **Courtesy Taxi Co-operative Ltd. V. Lucian Joseph**⁵.

[7] The starting point is the Civil Procedure Rules 2000 rule 62.19. It provides:

“62.19 Except so far as the court below or the court or a single judge of the court otherwise directs _

(a) an appeal does not operate as a stay of execution or of proceedings under the decision of the court below; and

(b) any intermediate act or proceeding is not invalidated by an appeal.”

As to whether a party is entitled to a stay or not, in **Marie Makhoul v. Cecily Foster**⁶ George-Creque, J.A had this to say:

“[3] The general rule is for no stay, as a successful litigant is entitled to the fruits of his judgment without the fetter. Accordingly there must be good reasons advanced for depriving or in essence enjoining a successful litigant from reaping the fruits of a judgment in his favour particularly after a full trial on the merits.

[4] The modern authority on the guiding principles the court employs in exercising its discretion to grant a stay is the case of **Linotype-Hell Finance Ltd. v. Baker**⁷ where Straughton L.J. opined that a **stay would normally be granted if the appellant would face ruin without the stay and that the appeal has some prospect of success.** It must be emphasized that it is not enough to merely make a bald assertion to the effect that the an applicant will be ruined. Rather **what is required is evidence which demonstrates that ruination would occur in the absence of a stay.** (Emphasis is mine)

[5] The authority of **Hammond Suddard Solicitors v. Agrichem International Holdings Ltd.**⁸ is grounded in the same principle although formulated differently. In that case the court pointed out that the evidence in support of a stay needs to be full, frank and clear [see para.13]. They went on to state the principle thus:

⁴Antigua and Barbuda Civil Appeal HCVAP 2009/014

⁵Saint Lucia Civil Appeal HCVAP 2008/043

⁶ibid.

⁷[1993] 1 W.L.R. 321 at p. 323

⁸[2001] EWCA Civ. 2065

“... Whether the court should exercise its discretion to grant a stay will depend on 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 the 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] Notwithstanding that the Court was not given sight of the grounds of appeal, the Court has observed and summarizes the thrust of Counsel for the Second and Third Defendants submissions as this, firstly, the winding up order was a bar to any further actions by the Claimant to secure payment of its debt, and secondly the Second Defendant would be deprived of an asset which he had for the purpose of financing his retirement.
- [9] Adopting the formula of Joseph-Olivetti J.A.(Ag) in **Courtesy Taxi Co-operative Ltd. v. Lucien Joseph**⁴ the crucial questions for the Court are: (a) whether the Second and Third Defendants have a realistic prospect of success in their appeal, and (b) whether there would be substantial prejudice if a stay were to be refused.
- [10] Notwithstanding that the grounds of appeal have not been disclosed to the Court, Counsel has not convinced the Court that the Second and Third Defendants would have a reasonable prospect of success at an appeal for the following reasons (a) nothing in the winding-up order in claim **SLUHCV2008/0102 IN THE MATTER of a Petition for winding up of Universal Fishing & Trading Company Limited** indicates that the Claimant participated in or agreed to any arrangement which the applicant may have asked the Court for in the winding up order or that the arrangement in the winding up order would satisfy the judgment, (b) there was no stay ordered of proceedings in the present suit under consideration (it being the earlier filed suit) in the winding up order made 13th May 2008, therefore the Claimant was at liberty to pursue its claim and eventual judgment against the Second and Third Defendants, (c) when a party such as the Second Defendant assigns his property as guarantor for a borrower, there is always a risk that should the borrower default, his property will be sold, and (d) there was no evidence provided that the

⁴ Saint Lucia HCVAP 2008/043

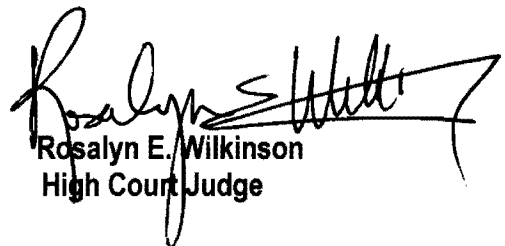
Claimant could not compensate the Second and Third Defendants in damages should they be successful at appeal and so avert the possible financial ruin of the Second Defendant.

[11] On the question of whether there would be substantial prejudice, the Court has not been provided with any evidence of prejudice other than a bald statement that the Second Defendant would be financially ruined as he intended to use the property for his retirement. There clearly has not been full and frank disclosure by the Second Defendant to support this bald statement.

[12] Counsel for the Second and Third Defendants having been called to Bar since 2007, I am indeed surprised and disheartened by Counsel's plea of ignorance as to how matters are processed in what can be described as the "heart" of the Court. It is strongly recommended that Counsel familiarize himself with the operations of the Registry. He could start with the question which perplexed him, why did the Court not have in its high court file the notice of appeal which he file as headed up in the Court of Appeal and which bore the stamp of the court of appeal, and a civil appeal number.

Conclusion

[13] The application for a stay is hereby refused. The costs of this application shall be costs in the appeal.


Rosalyn E. Wilkinson
High Court Judge