IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Application No. GYCV2018/002
GY Civil Appeal No. 68 of 2015

BETWEEN

RODRIGUES ARCHITECTS LIMITED
a company incorporated in Guyana whose registered office is A126 Robin's Place, Bel Air Park, Georgetown **APPLICANT**

AND

NEW BUILDING SOCIETY LIMITED **RESPONDENT**

Before The Honourables **Mr Justice Wit**
Mr Justice Hayton
Mr Justice Anderson
Mme Justice Rajnauth-Lee
Mr Justice Barrow

Appearances

Mr Timothy Jonas for the Applicant
Mr Nikhil Ramkarran for the Respondent

JUDGMENT
of
The Honourable Justices Wit, Hayton Anderson, Rajnauth-Lee and Barrow

Delivered by
The Honourable Mr Justice Hayton
on the 4th day of May, 2018

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Introduction

[1] The Applicant, Rodrigues Architects Limited ("the Company"), has applied for special leave, pursuant to s 8 of the Caribbean Court of Justice Act 2004, against a decision of the Full Bench of the Court of Appeal of Guyana given on 21st December 2017 in favour of the Respondent, New Building Society ("the Society"). In the event of leave being granted, the parties have consented to these proceedings being treated as the hearing of the intended appeal. In issue are the principles to be applied by a court when faced with an application for a stay of execution of a money judgment.

[2] The basis for this application is the judgment of Rishi Persaud J dated 29th September 2015 in High Court Action 2008-HC-DEM-CIV-CD-969 brought by the Company against the Society. As a result of the trial of the action the Judge gave judgment in favour of the Company. He

> "ordered that the Plaintiff do recover from the Defendant the sum of $15,897,625 (fifteen million, eight hundred and ninety seven thousand, six hundred and twenty-five dollars) being the balance of an amount due owing and payable by the Defendant to the Plaintiff for architectural consultancy services undertaken and performed by the Plaintiff at the request of the Defendant in respect of construction of the Defendant's proposed head office situate at North Street and Avenue of the Republic , Georgetown, together with interest thereon at the rate of six per cent (6%) per annum from 27th November 2008 to 29th September 2015 and thereafter at the rate of four per cent (4%) per annum and costs in the sum of $100,000 (one hundred thousand dollars)."

He further ordered that there be a stay of execution for a period of six months from the date of the order.

[3] On 6th November 2015 the Society filed an appeal, filing also on 9th December 2015 an application to Roy JA in Chambers for a stay of execution of the order or, instead, an order that the Society deposit the judgment sum into an interest-bearing account at a commercial bank.

[4] On 5th February 2016 Roy JA granted a stay of execution until the hearing and determination of the appeal and ordered that the judgment sum should be lodged by the Society with the Registrar and deposited in an interest-bearing account.

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The Society complied as revealed by a receipt dated 15th February 2016 given by the Registrar's office for $15,897,625 paid by the Society.

[5] On 11th February 2016 the Company applied by Notice of Motion to the Full Bench of the Court of Appeal for it to discharge the stay granted by Roy JA and requesting that a stay of the order of 29th September be refused. On 21st December 2017 the Court of Appeal dismissed the application, having pointed out that it only has a reviewable jurisdiction over orders made by a single judge of the Court of Appeal[1] and so the Company would not be entitled to the refusal of a stay as a fresh application to the Full Bench.

[6] As Lord Woolf MR in *Phonographic Performance Ltd v AEI Rediffusion Music Ltd* remarked[2] of appellate courts reviewing the exercise of a judge's discretion, "Before the court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered or that his decision was wholly wrong because the court is forced to the conclusion that he has not fairly balanced the various factors fairly in the scale."

[7] Similarly, in a leading Caribbean case, *Attorney General of Trinidad and Tobago v Miguel Regis*[3], the Court of Appeal laid down the following as "well-established."

> "The appellate court will generally only interfere if it can be shown that the trial judge was plainly wrong. Thus, we may say that unless it can be demonstrated for example that the trial judge disregarded or ignored or failed to take sufficient account of relevant considerations or regarded and took into account irrelevant considerations or that the decision is so unreasonable or against the weight of the evidence or cannot be supported having regard to the evidence or that the judge omitted to apply or misapplied some relevant legal principle or that the decision is otherwise fundamentally wrong, the Court of Appeal will not generally interfere with the exercise of a court's discretion."

[1] Citing *Gahindra Narine v National Bank of Industry and Commerce Ltd* [2001-2002] GLR 279.
[2] *Phonographic Performance Ltd v AEI Rediffusion* [1999] 1 WLR 1507, 1523 endorsing similar dicta in earlier English Court of Appeal cases.
[3] Civil Appeal No 79 of 2011, 13 June 2011, at [11].

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The Court of Appeal Judgment

[8] The Court of Appeal rightly appreciated[4] that it had to review whether the principles applicable to the grant or refusal of a stay pending appeal were correctly applied by Roy JA in Chambers, taking account of the affidavit evidence upon which he relied for the just exercise of his discretion. It had a difficult task, however, when there were no written reasons of Roy JA or of the trial judge available and no transcript of the evidence. Nevertheless, the court concluded at [16] "We are of the view that the Judge in Chambers did not exercise his discretion improperly. We feel that the balance of justice at this stage lies in maintaining the stays granted by the Judge in Chambers until the hearing and determination of the appeals."

[9] The grounds of the application to Roy JA for a stay of execution were that the Society "has reasonable and compelling grounds of appeal and stands a reasonable prospect of success upon appeal, and if the judgment sums are paid out to the respondent there is no reasonable prospect of recovery in the event the Society's appeal is successful and the appeal would thus be rendered nugatory."[5]

[10] Gregory JA, delivering the judgment of the Court of Appeal, cited[6] *Linotype-Hell Finance Ltd v Baker*[7] as providing the current approach to an application for a stay of execution pending appeal. Indeed, in *Ramdehol v Ramdehol*[8] we had earlier accepted this, stating

> "Until *Linotype-Hell Finance Ltd v Baker* a stay of execution pending appeal was only granted where the applicant satisfied the court that if damages and costs were paid, there was no reasonable probability of getting them back if the appeal succeeded: see *Atkins v Great Western Railway.*[9] We agree with Staughton LJ that that test is too restrictive and that a stay may also be granted if the applicant persuaded the court that without a stay of execution he or she would be ruined and that the appeal had some prospect of success."

Unsurprisingly, the 9th December 2015 affidavit of the Society's CEO in support of its application to Roy JA did not allege that it, a substantial Building Society,

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[4] At [5]
[5] CCJ Record p 22.
[6] At [7]
[7] [1992] 4 All ER 887
[8] [2013] CCJ 9 (AJ) at [16]
[9] [1886] 2 TLR 400

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would be ruined if forced to pay out the amount of the judgment sum against it, nor could it allege this when actually offering to pay the money into an interest-bearing account at a commercial bank.

[11] As to the Society's prospects of success in its appeal, in the unavailability of the trial judge's written reasons for his order, its CEO only summarised some grounds of appeal in paragraph 6 of the said affidavit. As Gregory JA stated[10],

> "The instant appeals involve contentions surrounding interpretation of contracts and industry practices. The findings of the learned trial judge would have been based in large measure on his evaluation of documentary evidence and on his assessment of witnesses. There is at this stage of the proceedings no material or notes from the trial upon which an assessment of the prospects of success of the appeal can be undertaken."

[12] On this footing Roy JA erred in principle granting a stay of execution and Gregory JA should have so stated. Roy JA and Gregory JA should also have expressly dealt with the Society's bald assertion, in its application and paragraph 7 of its CEO's affidavit in support[11], that the Society had no reasonable prospect of recovering the amount paid out if its appeal should prove successful. This test of "no reasonable prospect" was the formula used by the Society before Roy JA and the Court of Appeal, though the traditional formula, as mentioned in *Linotype*, was "no reasonable probability." Both formulae, however, require the applicant for a stay to show that it is more probable than not that he would be unable to recover the amount paid out if his appeal succeeded.

[13] In response to the Society's CEO's affidavit, Mr Albert Rodrigues, a director of the Company, stated as follows in paragraph 8 of his affidavit.[12]

> "(a) The judgment is for a sum of money simpliciter.
> (b) I am the owner by virtue of Transport No 1579 dated 1st December 1982 of property at A -126 Robin's Place, Bel Air Park, which houses the respondent Company. The property is unencumbered and is valued for in excess of $50,000,000 (fifty million dollars). A copy of the said Transport is hereto attached and marked 'B'.
> (c) I am prepared to guarantee to this Court repayment of the judgment sum if the appeal by the appellant is successfully prosecuted, and am

[10] At [9]. She also stated in her brief oral, recorded judgment of 21st December 2017 (Record p 158), "Until we see the Trial Judge's reasons and we also have before us the record of the trial, we ought not to interfere with the stay." After the hearing before the CCJ, written reasons of Rishi Persaud J apparently dated 26th October 2015 were forwarded from Guyana by the Registrar, but this was too late, counsel having agreed upon proceeding by way of a consent order.
[11] CCJ Record pp 18 and 22
[12] CCJ Record p 25

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willing further to undertake not to encumber or alienate the property pending the appeal without the leave of the Court to support that undertaking.

(d) I have been practising as an Architect in Guyana qualified under the Royal Institute of British Architects in excess of thirty-five (35) years and am willing and able in any event to repay the sums if the appeal is successful."

[14] It appears that Mr Rodrigues' above sworn statement was not challenged by the Society. The statement was repeated in paragraph 7 of his 11th February 2016 affidavit[13] in support of his application to the Full Bench of the Court of Appeal, and the Society's CEO in his affidavit in answer to that application stated[14], "Having regard to paragraph 7, I have seen the purported proof of substance attached thereto and while I have no specific knowledge of the averments I have no basis on which to deny the veracity thereof."

[15] On this basis, one would have expected Roy JA to find that there was a reasonable prospect of the Society recovering its money if it succeeded in its appeal, especially on the basis of Mr Rodrigues guaranteeing repayment of any monies received by the Company if the Society's appeal was successful and undertaking to the court not to encumber or alienate his property housing the Company without the leave of the court. Indeed, the application for leave to this Court[15] alleges that Roy JA, despite the lack of a written judgment (i) did not pronounce on the merits of the substantive appeal and (ii) found that there was a reasonable prospect of recovery in the event that the appeal was successful, yet the Society's CEO did not challenge this in his affidavit in opposition. Roy JA thus fundamentally erred. If he did find that there was a reasonable prospect of recovery he should not have granted a stay of execution. If he did not find that there was a reasonable prospect of recovery this would have been unreasonable and against the weight of the evidence.

[16] Gregory JA for the Court of Appeal stated[16] that the Society argued for a stay on the basis that there was no reasonable prospect of recovery of the judgment

[13] CCJ Record p 44
[14] CCJ Record p 74
[15] CCJ Record p 3
[16] At [6]

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sum from the Company if paid out, and[17] that the Company argued against any stay, exhibiting "evidence of long-standing business and professional services for reward and of financial means. This evidence included documents of title to immovable property valued in excess of the judgment sums". Gregory JA then failed to decide whether there was or was not a reasonable prospect of recovery when this is a particularly crucial issue in the case of money judgments.

[17] Thus neither Roy JA nor the Court of Appeal fulfilled their duties in reviewing the parties' position, so that special leave must be granted to prevent a substantial miscarriage of justice and the appeal must be allowed.

The factors to be considered in exercising the discretion to grant stay of execution of a money judgment

[18] Counsel for the Company in his written submissions[18] set out the law relating to stays of execution, supported by relevant authorities (though there is a dearth of Guyanese cases), and counsel for the Society[19] did "not take issue with the law relating to stays of execution as set out in learned counsel's submissions", though emphasising that the issue is essentially one for the exercise of the court's discretion.

[19] The exercise of this judicial discretion is, however, not an arbitrary one but takes place within relevant parameters designed to enable the judge to determine whether the applicant for a stay has satisfied the court that, having regard to all the circumstances of the case and the risk of injustice, a stay ought to be imposed. As Jones JA stated for the Court of Appeal of Trinidad and Tobago in *National Stadium Project (Grenada) Corporation v NH International (Caribbean) Limited*[20], "It is trite law that an appeal does not operate as a stay of the judgment or order appealed. The basic rule is that a successful litigant is entitled to enjoy the fruits of its success. The onus therefore is on the applicant for a stay to satisfy the court that, having regard to all the circumstances of the case and the risk of injustice, a stay ought to be imposed." In support, Jones JA relied[21] upon a statement of Rajnauth-Lee JA in *Andre Baptiste v Investment Managers Ltd*[22]

[17] At [8]
[18] CCJ Record pp 105-108
[19] CCJ Record p 139
[20] Civil Appeal No 48 of 2011, 28 July 2017 at [10]
[21] Ibid at [11]
[22] Trinidad & Tobago Civil Appeal No 181 of 2012 at [13]

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applying the view of the English Court of Appeal in *Hammond Suddard Solicitors v Agrichem International Holdings Ltd*[23] and cited by the Company's counsel.

[20] In *Hammond*, under the English Civil Procedure Rules 52.3 and 52.6, permission to appeal is required to have been granted before an appeal can proceed, and such permission requires there to be a "real prospect of success of the appeal." Thus, in applications for a stay of execution pending determination of the appeal it is already established that such prospect of success exists. Clarke LJ, therefore, focused[24] upon the court's task as –

> "whether there is a risk of injustice to one or both parties if it grants or refuses 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 to the respondent?"

[21] In *National Stadium* Jones JA accepted as "in accordance with the established principles"[25] that "it was incumbent on the applicant to show that the appeal had a good prospect of success", but rejected the view of Weekes JA in Chambers that the applicant did not have a good prospect of success, since she had the benefit of dicta of Lord Carnwath delivering a judgment of the Judicial Committee of the Privy Council after Weekes JA had rejected the application for a stay. Nevertheless, Jones JA agreed with Weekes JA that the applicant had not satisfied the onus of showing that the respondent would be unable to repay the monies paid out under the judgment if the applicant was successful in the appeal, so that the applicant had not satisfied the court that there would be a risk of injustice to it by the refusal of the requested stay of execution.

How to approach an application for stay of execution of a money judgment

[22] A stay of execution is the exception rather than the rule[26] and the onus is firmly on the applicant to make out the case for a stay, which requires the court to answer

[23] [2001] All ER (D) 258 (Dec) at [22]
[24] Ibid
[25] See n 20 (above) at [2]
[26] *Goldsmith v O'Brien* [2015] EWHC 510 (Ch) at [9]; *National Stadium* (n 20 above) at [10]

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the essential question whether, in all the circumstances, there is a risk of injustice to one or other of the parties if it grants or refuses a stay.

[23] To answer this question, the first issue is whether the applicant for a stay can satisfy the court that the applicant's appeal has a good prospect of success or, as the applicant argued before this Court in *Ramdehol v Ramdehol*[27], has a "good arguable appeal." If not, no stay should be granted. Judges must be alert to tactical appeals of defendants trying to avoid paying out for the years it may well take before their appeal is heard. Judges must also appreciate that making orders, without at the same time delivering a reasoned judgment, will make it very difficult for defendants to obtain a stay of execution by showing a good arguable appeal except in rare cases where a court order may be regarded as self-evidently revealing a reason against which a good arguable case can be made. This may be the case where comparison of the claimant's written submissions with those of the defendant reveals that, for the judge to have made the particular order, the judge must have rejected – arguably wrongly – certain submissions of the defendant or must have accepted – arguably wrongly – certain submissions of the claimant.

[24] Ideally, a judge should not make an order without contemporaneously providing a comprehensive written judgment. There will, however, be cases where an order should be made as soon as practical but a judge's commitments are such that a comprehensive written judgment cannot be provided for some time. In such a case, a judge should ensure that he has made some brief notes enabling him or her to deliver a short oral judgment outlining the main reasons for giving a money judgment against the defendant and stating that an amplified, authoritative, comprehensive written judgment will subsequently be provided if an appeal is filed. The oral judgment should be recorded on a court facility or on counsel's hand-held devices or noted in counsel's notebooks.

[24] The second issue is can the defendant establish he would be ruined or his appeal otherwise be stifled if forced to pay out the judgment sum immediately, instead of after an unsuccessful appeal? If not, prima facie a stay should not be granted

[27] Note 8 at [15]

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unless an affirmative answer is given as to the third issue. The onus is on the defendant to provide full, frank and clear details of his financial position.[28]

[25] The third issue is can the defendant establish that there is no reasonable probability that the claimant will be in a position to repay the monies paid to him by the defendant to satisfy the money judgment if the defendant's appeal succeeds?[29] If the defendant can affirmatively establish that no such probability exists, prima facie a stay should be granted. The onus is on the defendant to produce a measure of evidence of the claimant's financial weakness sufficient to make it necessary for rebuttal by the claimant who has easily available personal knowledge of the claimant's own detailed financial position. If the claimant's financial position is sound then no stay should be granted. Moreover, a stay should not be granted only upon terms whereby the claimant's assets of corresponding value are frozen, not to be encumbered or disposed of in any way without the leave of the court, unless the claimant consents or the claimant's connection with the jurisdiction is tenuous or his circumstances particularly precarious. In the case of a company claimant in a weak financial position, it may be that no stay should be granted if a director or shareholder is prepared to guarantee any repayment needed to be made by the company if the defendant's appeal succeeds, and the defendant cannot show that there is no reasonable probability that such guarantor will be able to pay the guaranteed amount. It must, however, be noted that in the present case it is only because the Company's director, Mr Albert Rodrigues, keen for the Company to reap the fruits of its successful claim, offered his personal guarantee and undertaking referred to in [13] above, that we made the order in [29] below, requiring such guarantee and undertaking (by consent), rather than simply discharging the stay of execution.

[26] A fourth issue that may arise is what are the risks that the claimant will be unable to enforce the judgment if a stay is granted and the defendant's appeal fails? Here it may be that the just solution is for the defendant to pay the judgment sum into court to await the outcome of the defendant's appeal, assuming that such payment would not stifle the appeal and that payment to the claimant (rather than into

[28] See *Goldsmith v O'Brien* (n 26 above) at [9] – [13], applying *Hammond Studdard* (n 23 above) at [13]
[29] See *Leicester Circuits Ltd v Coates Brothers PLC* [2002] EWCA Civ 474 and Westlaw WL498798, 20 March 2002 for a positive answer despite some risk.

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court) might well lead to the monies being irrecoverable by the defendant from the claimant. This, however, ought to be a last resort so that the claimant if possible can have the monies available for entrepreneurial or investment opportunities.

[27] One must always bear in mind the words of Jones JA in *National Stadium Project*[30], "At the end of the day, however, it is for the applicant to satisfy the court that it is unjust in the circumstances for the respondent to enjoy the fruits of its success pending the determination of the appeal." To help determine the correct answer to this fundamental question, an Appendix is provided at the end of this judgment to set out guidelines for a decision on a stay of execution of money judgments.

Disposition

[28] Special leave to appeal to this Court is granted and the appeal against the judgment of the Court of Appeal is allowed.

[29] By consent, upon Mr Albert Rodrigues, director and shareholder of the Company

(i) guaranteeing repayment to the Society of monies received by the Company in satisfaction of the Society's liability to the Company in High Court Action 2008-HC-DEM-CIV-CD-969 in the event of the success of the Society's appeal against the 29th September 2015 judgment of Rishi Persaud J; and

(ii) undertaking to this Honourable Court to refrain from encumbering or alienating or disposing in any way howsoever his interest, rights and title to the property known as A-126 Robin's Place, Bel Air Park, Georgetown, Guyana which he owns by way of transport numbered 1579 of 1982, such undertaking to expire if the Society's said appeal fails, but, if the appeal succeeds, Mr Rodrigues has leave to encumber, alienate or dispose of his interest, rights and title to the said property for the purpose of enabling him to repay the said guaranteed monies, while once the said monies have been repaid the undertaking shall, in any event, expire;

[30] N 20 (above) at [14]

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it is ordered that:

(a) the order made on 5th February 2016 by Roy JA granting a stay of execution is discharged;

(b) the Company is at liberty to recover from the Registrar of the Supreme Court the judgment sum of $15,897,625 (fifteen million, eight hundred and ninety-seven thousand six hundred and twenty-five dollars) ordered by Roy JA to be lodged by the Society with the Registrar for deposit in an interest-bearing bank account (and so lodged on 15th February 2016) together with the accumulated interest thereon, in partial satisfaction of the Society's liability under the 29th September 2015 judgment of Rishi Persaud J;

(c) such deposited sum with interest thereon paid to the Company shall be set off against the aggregate monies due to the Company from the Society under the said judgment of Rishi Persaud J requiring interest to be paid on the said judgment sum at the rate of 6% from 27th November 2008 to 29th September 2015 and thereafter at the rate of 4%, and also requiring costs in the sum of $100,000 to be paid to the Company;

(d) the Company is at liberty to execute judgment against the Society to recover the balance of such aggregate monies after receipt of the above deposited sum and interest from the Registrar;

(e) costs fixed in the sum of $200,000 shall be paid by the Society to the Company.

Appendix

Guidelines for a decision on a stay of execution of a money judgment

C has obtained a money judgment against D who appeals and applies for a stay of execution. C objects. The Court of Appeal Judge in Chambers must ask the following questions.

Q1 Has D satisfied me that D's appeal has a good prospect of success?

- If yes, proceed to Q2.
- If no, a stay should not be granted.

Q2 Has D satisfied me that D will be ruined, or his appeal otherwise be stifled if forced to pay C immediately instead of after the (unsuccessful) appeal?

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- If yes, a stay can be granted subject to considering the answers to Q4.
- If no, a stay should not be granted unless a positive answer is given to Q3.

Q3 Has D satisfied me that there is no reasonable probability that C will be able to repay the monies paid to C by D?

- If yes, a stay should be granted, subject to considering the answers to Q4.
- If no, a stay should not be granted.

Q4 What are the risks that C will be unable to enforce the judgment if the stay is granted and D's appeal fails? Depending on the extent of that risk and other relevant circumstances can there be a compromise solution: payment of all or part of the relevant sum into court to await determination of the appeal; a stay only of part of the judgment sum; provision of security for part of C's payment to D? A compromise solution should be a last resort, the basic rule being that a money judgment must be complied with, so that a claimant is entitled to recover the money straightaway and not to suffer further losses or lost opportunities in the period till the appeal is heard.

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ D. Hayton

The Hon Mr Justice D Hayton

/s/ W. Anderson

The Hon Mr Justice W Anderson

/s/ M. Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/ D. Barrow

The Hon Mr Justice D Barrow

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