BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO 4 OF 2005
BETWEEN:

MICHAEL ANTONIO SMITH, JR.

ENROY McKENLEY SMITH

JAMES ANTHONY

BYRON SMITH

RUFUS SMITH

(Suing on behalf of themselves in their personal and representative capacities and all other persons being entitled to be directors and shareholders of Duff's Valley Corporation Ltd. except Ishmael Brathwaite)

Appellants/Applicants

and

LINTON WHEATLEY

MAC FRED WHEATLEY

Respondents

Before:
The Hon. Mr. Hugh Rawlins — Justice of Appeal [Ag.]

Appearances:
Mrs. Benedicta Samuels-Richardson for the Appellants/Applicants
Mr. John Carrington for the Respondents

2005: April 26, 27
July 25

JUDGMENT

[1] RAWLINS, J.A. [AG.]: The Appellants/Applicants ("the Appellants") were the Claimants in Claim No. BVIHCV2004/0138 and the Respondents, the Wheatleys, were the Third and Fourth named Defendants in that Claim. On 28th October

2004, the Wheatleys applied for an Order to dismiss the Claim against them with costs. They made the application on 2 main grounds. The first was that the Claim was an abuse of the process of the Court in the light of a Judgment of 16th July 2004 in which the Court granted summary judgment in their (the Wheatleys') favour. The second ground was that the Statement of Claim did not disclose any cause of action that had any reasonable prospect of success against them.

[2] Barrow J (Ag.) heard the applications and struck out the Claim against the Wheatleys. He ordered the Appellants to pay costs, which he subsequently assessed at $6,000.00. The Appellants were granted leave to appeal the decision. Subsequently, in a Notice that was filed on 6th April 2005, they applied to stay the costs Order until the appeal is heard and determined by the Court. This application came before me for hearing pursuant to Part 62.14 of the Eastern Caribbean Supreme Court Civil Procedure Rules, 2000 ("the Rules"). On 27th April 2005 I dismissed the application and ordered the Appellants to pay $600.00 costs to the Wheatleys within 6 weeks of the Order. Counsel for the Appellants requested a written Judgment, which I now deliver. First, the basic principles.

The principles

[3] The basic principles that are applicable on an application for stay are trite. Part 62.16(1) of the Rules permits a single judge of this Court to grant a stay of a judgment or order against which an appeal is made, pending the determination of the appeal. Part 62.19(a) of the Rules states the general rule that an Appeal does not operate as a stay of execution or of proceedings under the decision of the High Court, except so far as that Court or this Court otherwise directs. These last words reflect an acceptance that the Court has an unfettered discretion to depart from the general rule if the interest of justice requires it. Usually, where the justice of applying the general rule is in doubt, the Court might consider the perceived strength of the appeal.

[4] The Court is likely to grant a stay where the judgment or Order would be rendered nugatory or the Appellant would suffer loss, which could not easily be recovered from the Respondent, if the stay is not granted. The person who applies for a stay must satisfy the Court that it is just to grant it.

The cases for the Parties

[5] In their stay Application, the Appellants state that they will rely on the Affidavit that was filed in support of the Application for Leave to Appeal. Michael Smith, the First named Appellant, filed that Affidavit on 15th March 2005. Mr. Smith stated in that Affidavit that the Claim was instituted against several defendants, including the Wheatleys, in relation to the ownership of shares in, the control of Duff's Valley Corporation Limited and the sale of land, which that company owns to the Wheatleys.

[6] According to Mr. Smith, the Defendants, except the Wheatleys, filed Defences in the Claim proceedings. The Wheatleys however applied for summary judgment on the ground that the Claim was already determined in a previous action and that it disclosed no cause of action against them. The Judge decided that the Claim was not in fact adjudicated upon in the earlier proceedings. He nevertheless treated the Application as one which challenged the capacity of the Appellants to bring the Claim. Mr. Smith insisted that the Learned Judge was wrong to do this because there was no application before the Court which invited a determination on the issue of the capacity of the Appellants to institute the Claim.

[7] Mrs. Samuels-Richardson insisted that the Application that was before the Court was for summary Judgment and not an Application to strike out the Claim. She submitted that the Appellants could make a strong case that the High Court misused its power to strike out. She urged this Court to take the view that the Order to strike out the Claim on the ground of capacity, without an application for it, is a significant pointer to the strength of the merits of the appeal.

[8] Mr. Carrington relied on Leicester Circuits Ltd. v Coates Brothers plc [2002] EWCA 474 (C.A. Civil Division) for the statements of principles that relate to stay of execution on appeal. In that case, the Claimant instituted proceedings against the Defendant on the ground that T4 ink, which the Defendant supplied for the Claimant's use in the manufacture of printed circuit boards, was unfit for its purpose. The Court gave Judgment for the Claimant for £493,000 and costs. The Defendant applied for leave to appeal and to stay the execution of the Judgment pending the outcome of the appeal. The Defendant contended that the finding of unfitness had no basis on the evidence, neither in law because the Court did not apply the proper test. The Defendant also contended that the Claimant had outstanding debts which created a real risk that it (the Defendant) would not be able to recover the monies in the event that the appeal succeeded. The Court of Appeal granted leave to appeal but refused to stay execution of the Judgment.

[9] Mrs. Samuels-Richardson submitted that Leicester Circuits and Antigua Commercial Bank v Charles Joseph, Civil Appeal No. 7 of 2004 (Antigua and Barbuda), to which I referred Counsel, are distinguishable from the present case. She said that, in the first place, these are cases in which a Claimant had a Judgment debt on the merits of the case, while the Wheatleys do not have a Judgment debt and the present case was not considered on merits. Mrs. Samuels-Richardson also submitted that the interest of justice requires that the appellants should have the chance to pursue the appeal without paying the costs that the Learned Judge ordered them to pay, particularly because the Claim was not struck out on merits and the appeal is very likely to succeed. She further submitted that the stay would not prejudice the Wheatleys because they would be entitled to costs in both Courts if they prevailed on the appeal.

[10] Mr. Carrington submitted that Leicester Circuits requires the Court to balance the alternatives. He contended that the Learned Judge correctly struck out the Claim against the Wheatleys under Part 26.3(1)(b) of the Rules in the manner in which he did because it disclosed no cause of action against them. He said that this

course of action accords with the overriding objective stated in Part 1 of the Rules, which contemplates that in order to save costs and to save Parties from themselves, the Court should not permit a Party to pursue a matter where it clearly has no merits.

[11] Mr. Carrington submitted, further, that the fact that the Appellants might be deprived of the costs money for some time is not detrimental, because that is the risk on an appeal. He reminded the Court that the Wheatleys built a substantial building on the property which is the subject of the dispute in the Claim and the value of it is such that it is more than sufficient security. He said, however, that if it were necessary, the Wheatleys could put the $6,000.00 on a Certificate of Deposit pending the outcome of the appeal.

Findings

[12] Part 26 of the Rules sets out the case management powers of the Court. Part 26.3(1)(b) gives the Court discretion to strike out a statement of case or any part of it that does not disclose any reasonable ground for bringing or defending a Claim. The discretion is to be exercised judicially. This action would usually be on the application of a Party and Parties will usually be permitted to state their case for and against striking out before this action is taken. There are instances, however when the statement of case or part thereof is so obviously bad that the Court may, on its own motion under its case management powers and pursuant to the overriding objective of Rule 1, raise the matter and act under Part 26.3(1)(b). This is what the Learned Judge did when the Application for summary judgment came for hearing. He was clearly of the view that the Appellants, as Claimants in the Claim proceedings, were not entitled to bring the Claim, which was in the nature of a derivative action against the Wheatleys because they did not have the capacity to do so. It is not obvious from the Judgment that the Learned Judge's decision was in error. The Appellants have not given good grounds to make an exception to the general rule that the appeal should not operate to stay the Judgment.

[13] It is my view that, for the purpose of a stay of execution, it does not really matter whether the decision, which is the subject of the stay application, is for a sum for which the Court entered Judgment on the merits or where costs is awarded. In either case the Party in whose favour the award was made is entitled to the fruits of the award. A Party that has been awarded costs should not be asked to forego receiving the sum merely because an appeal has been brought against the decision. The ability of that Party to further pursue litigation might depend upon having those costs. Additionally, the costs in this matter are a mere $6,000.00.

[14] In Antigua Commercial Bank, Learned Master Mathurin held that the Bank was not entitled to debit the sum of $3,352.00 from Mr. Joseph's loan account at the Bank. She ordered the Bank to remit that sum to the account and to pay $10,000.00 damages and $800.00 costs to Mr. Joseph. This Court refused to stay the Judgment on the ground that the Bank would have suffered little detriment if the stay were not granted. This Court found that the sum that Mr. Joseph stood to benefit from was relatively small in the context of the dealings between the Parties and in relation to the loan, which Mr. Joseph would have had little difficulty repaying if the Bank prevailed on the appeal. Similarly, $6,000.00 is quite a small sum in the context of the present case and the Wheatleys should have little difficulty repaying it and any costs awarded if the Appellants prevailed on the appeal.

[15] In the foregoing premises, the justice of applying the general rule that an appeal does not operate as a stay is not in doubt. It was on this basis that I ordered that the Application that the Appellants filed on 6th April 2005 for an Order staying the costs Order of $6,000.00 until their appeal herein is heard and determined was dismissed with $600.00 costs in the Application to be paid to the Respondents within 6 weeks of the date on which the Order was made.

Hugh A. Rawlins
Justice of Appeal [Ag.]