

SAINT LUCIA

IN THE COURT OF APPEAL

HCVAP 2008/043

BETWEEN:

COURTESY TAXI CO-OPERATIVE SOCIETY LTD.

Appellant

and

LUCIEN JOSEPH

Respondent

Before:

The Hon. Mde. Ola Mae Edwards
The Hon. Mr. Michael Gordon, QC
The Hon. Mde. Rita Joseph-Olivetti

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Ms. Lydia B. Faisal for the Appellant
Mr. Eghan L.K. Modeste of Michel & Company for the Respondent

2009: March 6;
May 18.

Civil Appeal – Civil Procedure – whether there is an appeal pending against arbitration award – stay of execution – governing principles – whether there is a prospect of success on appeal – whether there is a risk of injustice or prejudice – section 5 of the Eastern Caribbean Supreme Court Act Chap. 2:01 – rule 62.19 of the Civil Procedure Rules 2000 – Co-operative Societies Act Chap 12:06 – Co-operative Societies (Appeals Tribunal) Regulation S.I 48/2003

The appellant ("Courtesy Taxi") is a co-operative society of which the respondent ("Mr. Joseph") was a member, until his expulsion. Mr. Joseph instituted arbitration proceedings against Courtesy Taxi pursuant to the **Co-operative Societies Act** Chap 12.06 ("the Act") and on 29th June 2005, was awarded \$270,300.00 together with statutory interest at a rate of 6% per annum. Courtesy Taxi gave notice of appeal to the Secretary of Co-operative Societies by letter of 26th July 2005, and was notified, eight months later, that the appeal was out of time. On 4th July 2006, Courtesy Taxi sought the leave of the Co-operative Societies Appeals Tribunal ("the Tribunal") to appeal out of time and filed its notice of appeal. The application does not appear to have been dealt with formally but the appeal was set for hearing before the Tribunal on 9th January 2009. Subsequent adjournments,

the expiration of the tenure of the members of the Tribunal and the failure to re-constitute the Tribunal prevented the hearing of the appeal.

On 29th September 2008, Mr. Joseph applied to the High Court to enforce the arbitrator's award. On 14th November 2008, Courtesy Taxi sought a stay of execution of the award pending the appeal before the Tribunal. By an oral decision of 3rd December 2008, the learned judge refused the application on the ground that there was no appeal or no valid appeal being prosecuted and ordered Courtesy Taxi to pay the award by 28th February 2009. Courtesy Taxi was granted leave to appeal to the Court of Appeal by order dated 20th January 2009.

Held: allowing the appeal, setting aside the order of the learned judge and ordering a stay of execution pending the determination of the appeal to the Tribunal with costs in this court to the appellant:

1. The Tribunal, by its actions, can be taken to have granted the application for an extension of time to appeal and to have taken steps to proceed with the hearing of the appeal. The learned judge accordingly erred in holding that there was no appeal or no proper appeal before the Tribunal.
2. The court must have regard to all the circumstances of the case in exercising its discretion to grant or refuse a stay of execution. This necessarily includes a consideration of the prospects of success on appeal. The essential question however is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay.

Linotype-Hell Finance Ltd v Baker [1993] 1 W.L.R. 321 explained and not applied. **Hammond Suddards Solicitors v Agrichem International Holdings Ltd.** [2001] EWCA Civ 2065 applied.

3. Courtesy Taxi has a realistic prospect of success on appeal before the Tribunal and would suffer substantial prejudice if the arbitrator's award is enforced before it is given the opportunity to pursue its appeal. Mr. Joseph has alluded to no prejudice that would befall him if he were required to await the outcome of the appeal. In all the circumstances of the case therefore, there is a real risk of injustice to Courtesy Taxi. The learned judge accordingly erred in refusing the stay of execution.

JUDGMENT

- [1] **JOSEPH-OLIVETTI, J.A. [AG.]:** This is an appeal against an order refusing a stay of execution of an award obtained pursuant to arbitration proceedings under

the **Co-operative Societies Act**¹ ("the Act") and ordering that the appellant, the Courtesy Taxi Co-operative Society Ltd. ("Courtesy Taxi"), comply with the award by 28th February 2009.

Grounds of Appeal

- [2] The grounds of appeal as contained in the notice of appeal are that the learned judge was wrong and erred in law when he: (a) made the order despite the absence of any application for leave to enforce in accordance with section 190 of the Act; (b) expressly stated that he had no interest in the merits of the case of either party; (c) dismissed Courtesy Taxi's application when there was an appeal ongoing before the Co-operative Societies Appeals Tribunal ("the Tribunal"); (d) held Courtesy Taxi responsible for the delay before the Tribunal by stating that it had failed to prosecute its appeal when there was clear evidence to the contrary; and (e) acted in excess of his jurisdiction by making a final determination in a matter that is on appeal before another judicial body thereby usurping its function and rendering the ongoing proceedings nugatory.
- [3] Of the several issues canvassed, the question whether the learned trial judge properly exercised his discretion when he refused the stay of execution lies at the heart of grounds (b), (c) and (d) and I shall consider that issue first against a brief factual background.

The Facts

- [4] The respondent, Mr. Joseph, on 29th June 2005, obtained an award against Courtesy Taxi, for the sum of \$270,300.00 with statutory interest at 6% per annum pursuant to arbitration proceedings conducted under the auspices of the Act. The arbitration proceedings arose out of Courtesy Taxi's decision to expel Mr. Joseph from its membership.

¹ Chap. 12.06 of the 2001 Revised Laws of Saint Lucia

- [5] By letter of 26th July 2005, to the Secretary of the Tribunal, Courtesy Taxi gave notice of appeal. Almost eight months later, on 25th April 2006, the Registrar of Co-operative Societies advised that the appeal was out of time and intimated that Courtesy Taxi should seek leave of the Tribunal to file its appeal out of time. Courtesy Taxi on 4th July 2006, made the appropriate application and filed its notice of appeal. It appears that that application was never dealt with formally but that the Tribunal took steps to have the appeal heard, but for several reasons it was not heard and is still pending.
- [6] On 29th September 2008, Mr. Joseph applied to the High Court pursuant to section 190 of the Act for the award to be enforced in like manner as a judgment or order of the High Court. On 14th November 2008, Courtesy Taxi made an application to the High Court for a stay of execution pending appeal. The learned judge heard the applications on 3rd December 2008, and refused the application of Courtesy Taxi on the basis that there was no appeal or no valid appeal being duly prosecuted and ordered that Courtesy Taxi pay the award by 28th February 2009.
- [7] On 20th January 2009, Edwards, J.A. granted the appellant leave to appeal and the court gave certain case management directions including directions as to the filing and service of written submissions. The court also ordered that the appeal be determined by a single judge without a hearing.
- [8] Despite the order the matter was set for open court. On that day, Mr. Modeste, learned counsel appearing on behalf of Mr. Joseph, submitted that he was not in a position to make oral submissions as he had been misled by the notice of hearing issued by the court which stated that the matter was set down for directions. He added that he also did not anticipate a hearing before the full court in light of the earlier order of Edwards J.A.
- [9] Regrettably, this state of affairs was indeed attributable to the court. Fortunately, as both parties had filed substantial submissions, the court determined after hearing the parties on this issue that oral arguments were not necessary and that it would decide the matter purely on the written submissions in keeping with the

order of Edwards J.A. However, the court gave Mr. Modeste one week to reply to Courtesy Taxi's submissions which he had only just seen and reserved judgment pending these submissions. The submissions were duly filed and served.

Did the learned trial judge properly exercise his discretion when he refused to grant a stay of execution?

[10] The High Court and this Court have power to grant a stay of execution pending appeal by virtue of section 15 of the **Eastern Caribbean Supreme Court (Saint Lucia) Act**² and CPR 62.19.³ The power in both courts is discretionary and the principles which should inform the exercise of this discretion are well established as this court has seemingly embraced the principles enunciated by the English courts in **Hammond Suddards Solicitors v Agrichem International Holdings Ltd.**⁴ and **Linotype-Hell Finance Ltd v Baker.**⁵

[11] However, it seems to me that the identical approach has not been adopted in these two cases. The principle which may be extracted from **Linotype-Hell Finance Ltd.**, on a cursory reading only, is that an appellant seeking a stay pending appeal must show that he will be financially ruined if he is made to comply with the order appealed against. However, to so limit the case would be to run the risk of going contrary to the real rationale expressed in that case. On a closer reading, it is clear that Staughton LJ was seeking to change the position which obtained prior to that case as he viewed it as too rigid. He took issue with the nineteenth century cases cited in paragraph 59/13/1 of *The Supreme Court Practice 1991*, p. 957 and expressed the view that the principles gleaned from those cases were too stringent.⁶

² Chap. 2:01

³ This rule provides *inter alia* that an appeal does not operate as a stay except so far as the court below or the court of appeal or a single judge of the court otherwise directs. This rule could be more happily framed as the power must be inferred from those words.

⁴ [2001] EWCA Civ. 2065

⁵ [1993] 1 W.L.R. 321

⁶ See p. 323

[12] The principle being questioned in **Linotype-Hell Finance Ltd.** was:

"As a general rule the only ground for a stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable probability of getting them back if the appeal succeeds."

Having said that that rule was too stringent, the learned justice of appeal could hardly be taken to have intended to replace it with an even more taxing rule of requiring an appellant to show that he will be financially ruined if a stay were not granted. To so restrict his ruling would be to do him and the law a disservice. In my view, **Linotype-Hell Finance Ltd.** simply decided that the old approach was no longer the proper approach and that financial ruin coupled with an arguable case on appeal was a good reason for granting a stay. The court said, after eschewing the old practice:

"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**".⁷

It may be noted that the court did not state that it was **the only** ground.

[13] I prefer the approach taken in the later case of **Hammond Suddards Solicitors** which was considered after the English courts brought into effect their CPR and which is more in keeping with the spirit and objective of our CPR.

[14] The formulation in **Hammond Suddards Solicitors** was framed thus by Clarke LJ who delivered the judgment of the court:

"By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon 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 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

⁷ Ibid, emphasis mine

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

- [15] This approach to my mind accords well with CPR 1.2(a) which provides that the overriding objective must be considered whenever the court is called upon to exercise discretion. To apply rigid formulations must necessarily detract from that mandate. **The English Civil Court Practice 2008**⁹ also reiterates the **Hammond Suddards Solicitors** formulation. This approach is eminently more just as it gives the court authority to look at all the circumstances of a case in the round and does not fetter the discretion to the very limited ground of financial ruin as there may be circumstances other than financial disaster which would make it unjust to refuse a stay, as for example, not all orders are monetary orders.
- [16] Mr. Modeste submits in essence that the learned judge exercised his discretion properly when he refused to grant a stay as Courtesy Taxi does not have an appeal or a valid or proper appeal pending before the Tribunal and therefore cannot seek a stay of execution pending appeal. Indeed, the learned judge so held as reflected at pages 14 to 23 of the Transcript which also puts it beyond doubt that the learned judge did not allude to the governing principles. The first question therefore must be whether there is an appeal pending against the award.
- [17] An appeal from an award under the Act lies to the Tribunal. By regulation 5(1) of the **Co-operative Societies (Appeals Tribunal) Regulations**¹⁰ an appellant has fourteen days within which to appeal to the Tribunal. And, by Regulation 10(1) an appeal must be heard within 60 days of the decision.
- [18] Admittedly, Courtesy Taxi filed their appeal late because they had not received the decision in a timely manner from the Registrar of Co-operative Societies but when they became aware of that fact through surprisingly, the Registrar's communication to the opposing party, they applied for an extension.

⁸ Emphasis mine.

⁹ The Green Book, p. 1230

¹⁰ S.I. 48/2003

- [19] It appears that although the application to extend was not dealt with formally that the appeal was set for hearing before the Tribunal on 9th January 2007, and implicit in that must be that the Tribunal determined to extend time and to entertain the appeal. That hearing was later adjourned to 30th May 2007, when the Tribunal gave certain directions for the prosecution of the appeal and a further hearing was set for 5th July 2007. The matter was plagued with further adjournments in the main resulting from the inability of Mr. Joseph's counsel to attend. Further, in July 2008, the tenure of the members of the Tribunal expired. It appears that the Tribunal had not been constituted by the time the application was heard. This is a matter for the Government and the evidence indicates that no appointments were anticipated until February 2009.
- [20] The position then, as I see it, is that the Tribunal has proceeded to hear the appeal and the fact that no formal ruling on Courtesy Taxi's application for an extension of time within which to hear the appeal has been made cannot be regarded as the basis for saying that there is no valid appeal pending. The Tribunal, by its actions, can be taken to have granted the application and to have taken steps to proceed with the hearing of the appeal. One cannot therefore say that there is no appeal or no proper appeal before the Tribunal.
- [21] Having decided the application on this point the learned trial judge did not go on to consider the other principles which must be considered in determining whether or not to grant a stay, as indeed having so ruled he had no need to do so. Thus, it cannot be said that he brought his mind to bear on the relevant considerations in the exercise of his discretion and accordingly, in the circumstances, this court is free to consider the question anew and to exercise its own discretion. However, I am constrained to say that having read the transcript of the proceedings that it appears that the learned trial judge was concerned at the delay in prosecuting the appeal and made his order with the intention that that appeal would be proceeded with before the time fixed for satisfaction of the award. He thus was not unaware of the potential prejudice to Courtesy Taxi but felt compelled to serve as a catalyst. In so doing, he was misguided, although he acted with the best of intentions.

Should the court of appeal grant or refuse the application for stay of execution?

- [22] The court of appeal, in exercising its discretion to grant or refuse the stay, must consider two questions: (i) whether Courtesy Taxi has a realistic prospect of success in its appeal before the Tribunal; and (ii) whether Courtesy Taxi would suffer substantial prejudice if a stay were to be refused.
- [23] I have considered the decision of the arbitrator and the proposed grounds of appeal. In my judgment, the proposed grounds cannot be said to be without merit.
- [24] In respect of the issue of substantial prejudice, the affidavit of Mr. Firmus Popo filed on behalf of Courtesy Taxi is illuminating. Mr. Popo explains that Courtesy Taxi is a small Co-operative Society with over three hundred members and that they would be financially ruined if the award, which amounts to over 50% of their net assets, has to be paid now. Courtesy Taxi explains, and this has not been refuted, that they will go out of business if they are required to satisfy the award. In addition, I note that Mr. Joseph has alluded to no prejudice that would befall him if he were required to await the outcome of the appeal.
- [25] Accordingly, it can manifestly be seen that substantial prejudice will be caused to Courtesy Taxi if the award is enforced before they are given the opportunity to pursue their appeal to its conclusion. Indeed it may even be said having regard to their financial position that an appeal would be stifled if a stay is not granted.

Conclusion

[26] In all the circumstances, in my judgment, there is real risk of injustice to Courtesy Taxi if they are required to satisfy the award before their appeal is heard. Accordingly, I would allow the appeal and set aside the entire order of the learned judge and order a stay of execution pending the determination of Courtesy Taxi's appeal to the Tribunal. Courtesy Taxi is to have its costs in this court summarily assessed at \$1,000.00.¹¹ Having so held, it is not necessary to consider the other grounds of appeal canvassed.

Rita Joseph-Olivetti
Justice of Appeal [Ag.]

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Michael Gordon, QC
Justice Appeal [Ag.]

¹¹ It appears from the Transcript that no order for costs was made below. The 2/3 rule under CPR 65.13 cannot apply. The figure suggested seems reasonable having regard to the issues argued.