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

SAINT LUCIA

CLAIM NO. SLUHCV2006/0001

BETWEEN:

WINDWARD ENTERPRISES LTD.

Claimant

And

CARIBBEAN DESTINATION MANAGEMENT SERVICES LIMTED

Defendant/Ancillary Claimant

THE ROYAL BANK OF SCOTLAND LIMITED TRADING AS "NATWEST"

Ancillary Defendant/Respondent

Appearances:

Mr. Peter I. Foster with Diana Thomas for Claimant
Mr. Mark D. Mahraj for Defendant/Ancillary Claimant
Mr. Kendal Gill holding papers for Candace Cadasse Polius for Ancillary Defendant

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2009: December 09.

DECISION

[1] **GEORGES, J (Ag.):** On 18th May 2009 the Ancillary Defendant herein filed an Application for leave to appeal an order of the Court dated 6th May 2009 adjourning trial of this matter and granting costs thereby thrown away to the Claimant and the Defendant/Ancillary Claimant to be paid by the Ancillary Defendant within 7 days of the date of the order. The costs order was not and has not been complied with and the Ancillary Defendant has applied for a stay of execution. The Application was vigorously opposed.

[2] This decision is only concerned with the Application for stay relating to the award of costs granted to the Claimant and Defendant/Ancillary Claimant against the Ancillary Defendant pending determination of the appeal. The Application to appeal the order itself has yet to be heard.

[3] The Ancillary Defendant/Applicant ("the Applicant") states as its main ground for its application for stay of the order for costs that prior to the scheduled trial date on 6th May 2009 Counsel was called away from office and work due to a family emergency and was not in a position to deal with the trial of this matter.

[4] Two letters dated 30th April 2009 it was said were allegedly delivered on the same day to the Registrar of the High Court and Counsel for the Claimant and the Ancillary Claimant as well as the Court Clerk indicating the sudden circumstances faced by Counsel for the Applicant.

[5] However scrutiny of photocopies of the said letters on the court file shows the letters bearing the official stamp of the Registry of the Supreme Court and having been received on 05 May 2009, but the date 05 May is crossed out and the date 30April is written in its place. However, one of the said photocopy letters has written on it the note "rec. on 5/5/09 at 3:30pm" signed by the Court Administrator Ms. Stanislaus.

[6] Those letters did not come to the attention of the Court before the morning of the actual trial. The letters which are addressed to the Registrar and are similar in content read:

> *We wish to advise that our Mrs. Candace Cadasse Polius, who represents the Ancillary Defendant has full conduct of matter between the Ancillary Claimant and the Ancillary Defendant in the above-captioned suit, which is stated to be heard on the 6th day of May 2009, has been away from office from the 22nd day of April 2009 due to family emergency and as a consequence is not in a position to handle the matter on the schedule (sic) hearing date.*
>
> *In this regard, we humbly request an adjournment of only the matter between the Ancillary Claimant and the Ancillary Defendant to a date convenient to the Courts. We however see no reason why the original matter between the Claimant and the Defendant should be adjourned, and humbly request that the original matter between the Claimant and the Defendant continue on the scheduled date.*

[7] The letter was written by Kendall M. Gill who appeared in Court for the Applicant holding papers for Mrs. Candace Cadasse Polius an associate with the law firm of Nicholas John & Co. who had conduct of the matter.

[8] In the Affidavit in Support of the Application for stay Mr. Gill reiterates that two letters dated and delivered on 30th April 2009 were sent to the Registrar of the High Court and copied to others indicating the sudden circumstances faced by Counsel for the Applicant although as is plain from paragraph 6 above no specific details of 'the family emergency which allegedly kept Mrs. Polius away from the office from 22nd April 2009 and precluded her from handling the matter on the scheduled hearing date' have been disclosed.

[9] Adjournment of the Ancillary claim as between the Ancillary Claimant and the Ancillary Defendant was sought and it was suggested that the main claim as between the Claimant and the Defendant proceed. This was opposed by Counsel for the Claimant and the Ancillary Claimant as the matter had been scheduled for the composite trial of the case and that all witnesses would have been available for cross-examination if necessary thus ensuring the expeditious disposal of the matter and minimizing costs.

[10] This fully accords with the whole new culture of the Civil Procedure Rules 2000 in which litigation is now court driven and no longer dictated by litigants or their advisors. See CPR 18.14(3).

[11] In the instant case the witnesses for the Claimant and the Ancillary Claimant from overseas were all present and there was the cost of Counsel's preparation for trial and attendance at trial to be taken into account.

[12] With modern methods of communication technology there was clearly ample time to avert overseas witnesses from the of Isle of Man and elsewhere from traveling to St. Lucia when it appeared more likely than not from 22nd April 2009 onwards that Counsel for the Applicant would not have been available for the trial. Moreover both Counsel for the Claimant and the Defendant were understandably averse to the case being tried in two stages.

[13] I hasten to add that Mr. Gill's assertion at paragraph 8 of the Applicant's supporting affidavit that the adjournment letter dated 30th April 2009 was delivered to the Court on that self same date notwithstanding cogent evidence that they were in actual fact received on the late afternoon on 5th May 2009 has not gone unnoticed.

[14] More importantly as learned Counsel pointed out the Court will not normally grant a stay of execution unless cogent evidence is adduced and special circumstances are made out why it should. The absence of evidence that the applicant is unable to pay or that there is a risk that if the money if paid will not be recovered would have to be overwhelming if a stay is to be granted as exemplified by Thomas L J. at paragraphs 5 and 6 in Haydock Finance Ltd. v. Louis Transport Equipment Consultants Ltd [2005] EWCA Civ 450 where the learned Lord Justice declared:

> *It appears that some confusion occurred as to what should then have happened. It is quite clear from CPR Part 52.7 that, if a court is to consider a stay, a case has to be made. As is set out in the judgment of Potter LJ in Leicester Circuits Ltd v Coates Brothers Plc, the normal rule is for no stay. The notes to the annual practice also set out a decision of this court in Hammond Suddards Solicitors v Agrichem International Holding Ltd [2002] EWCA Civ 2065 where Clarke LJ sets out the applicable principles.*
>
> *It is clear to me, having heard the submissions made today by Mr. Roe, that there are no grounds for granting stay. It is not suggested in the application, or in the submissions that followed, that the appellant is unable to pay. Nor is it suggested, given the mechanism put forward by the claimant, that there is any risk that in the event of the appeal succeeding the money cannot be repaid. In those circumstances it seems to me that there would then have to be overwhelming reasons if a stay was to be granted.*

[15] The guiding principle is whether the applicant will be ruined if a stay is not granted or whether there is a risk of injustice to either the Applicant or the Claimant and the Defendant/Ancillary Claimant if a stay is granted or refused.

[16] The Applicant must provide positive and cogent evidence of ruin and or injustice as is illustrated in Daron Simon v Rolston Tongue (Antigua & Barbuda Civil Appeal No. 25 of 2008) where Creque-George JA refused an application for a stay even in circumstances where the application was not opposed because the affidavit was devoid of evidence in support of the allegations of grave risk of injustice stated therein.

[17] In the instant case the only evidence in support of the application for stay is at paragraphs 16 and 17 where Mr. Gill asserts that the judgment would be rendered nugatory if the appeal is successful and that the Applicant will suffer loss if the judgment is not stayed.

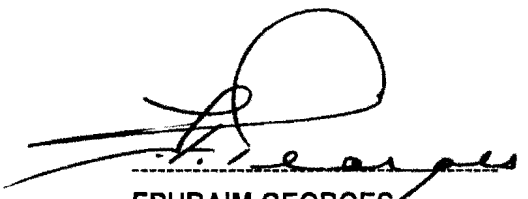
[18] No allegations have been made and/or evidence adduced as to the Applicant's means and as such the Applicant cannot show that it will suffer ruin if it pays the costs granted against it. No evidence is provided of what injustice it would suffer. Further there are no allegations made of the Claimant's ability or inability to repay should the need arise.

[19] Further as stated by Lord Justice Clarke at paragraph 20 in Hammond Suddard Solicitors v Agrichem International Holdings Ltd. [2001] ECWA Civ 2065:

Before it could properly grant a stay the court needs to have a full understanding of the true state of the company's affairs. Simple assertion particularly if it is scarcely consistent with previous assertions is not enough

So that the mere assertion that the Applicant will suffer financial loss is wholly insufficient to make out a case for ruin and is therefore no basis to grant a stay.

[20] In the final analysis therefore the Claimant's application to be granted a stay is accordingly refused with costs.



EPHRAIM GEORGES
HIGH COURT JUDGE (Ag.)