THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2015/0076

Between:

AGNES KHOURY

Claimant

and

CHARLES KHOURY

Defendant

Before:
Master Fidela Corbin Lincoln

Appearances:
John Carrington Q.C with Kalisia Marks and Sandy Khouly for the Claimant
Sharon Cort -Thibou for the Defendant

2016: September 27
November 16

Stay of Proceedings Pending Appeal – Court of Appeal Rules With Respect to Where Application Should be Made – Whether Appeal Would Be Rendered Nugatory - Balance of Harm – Whether The Grant of Leave to Appeal Means That Applicant Has Satisfied Requirement to Show a Strong Likelihood of Success of The Appeal

[1] CORBIN LINCOLN M : Agnes Khoury and Charles Khoury are mother and son. Ms. Khoury commenced this claim against Mr. Khoury to recover damages for breach of a contract concerning a loan of US$800,000.00 made by Ms. Khoury to Mr. Khoury. Mr. Khoury filed an application for an order striking out the claim on the basis that the court has no jurisdiction. The learned trial judge dismissed the application on 11th May 2016 and Mr. Khoury was ordered to file a defence within 28 days. Mr. Khoury filed an application in the Court of Appeal for leave to appeal the decision of the learned trial judge.

[2] The application before this court is an application by Mr. Khoury for an order staying the proceedings pending the outcome of his appeal and relieving him from sanctions for his failure to file a defence within time ordered by the court.

RELIEF FROM SANCTIONS

[3] Mr. Khoury did not file a defence within the time ordered by the learned trial judge or to date. He seeks an order relieving him from sanctions for his failure to file the defence within the time ordered by the court.

[4] The order fixing the time for the filing of the defence did not impose any sanction for non-compliance, there is no express sanction imposed by the Civil Procedure Rules 2000 ("CPR") for failing to file a defence within the time fixed by the court and no sanction is implied.[1]

[5] In the circumstance I find no basis for an application for relief from sanctions where there is no sanction imposed by the order or the CPR for failing to file a defence within the time fixed by the court.

[6] The application for relief from sanction is therefore dismissed.

STAY OF PROCEEDINGS – THE LAW

[7] The Court of Appeal Rules Part 30 (1) states:

> *"An appeal shall not operate as a stay of execution or of proceedings under the judgment appealed from, except so far as the court below or the Court may order…"*

[8] The Court of Appeal Rules Part 28 states that applications for a stay of execution and other interlocutory applications to the Court of Appeal shall ordinarily be made to a Judge of the Court of

[1] AG v Keron Matthews [2011] UKPC 38

Appeal "*but, where this may cause undue inconvenience or delay, a Judge of the court below may exercise the powers of a single Judge of the Court under that rule. "*

[9] An appellant's application for a stay of proceedings should therefore ordinarily be made to the Court of Appeal unless this would cause undue inconvenience or delay. Mr. Khoury has not led any evidence to establish that making the application to the Court of Appeal would have caused inconvenience or delay thus justifying making the application to this court.

[10] Notwithstanding, in the interest of time and costs the court will proceed to consider the application.

[11] In C-Mobile Services Limited v Huawei Technologies Co. Ltd. [2] Blenman JA held:

> *"There is no automatic right to a stay of proceedings pending appeal and a successful litigant should not normally be denied the fruits of its success pending appeal except for in exceptional circumstances. There are five relevant principles a court should apply when deciding whether to exercise its discretion to stay proceedings pending appeal. The first is that the court should take into account all the circumstances of the case. Second, a stay is the exception rather than the general rule. Third, the party seeking a stay must provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted. Fourth, in exercising its discretion, the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered. The fifth is that the court should also take into account the prospect of the appeal succeeding, but only where strong grounds of appeal or a strong likelihood the appeal will succeed is shown (which would usually enable a stay to be granted). "*

[12] A stay of proceedings is therefore the exception rather than the general rule. In determining whether a stay should be granted the court should have regard to all the circumstances.

[2] BVIHCMAP2014/0016

Will the Appeal be Stifled or Rendered Nugatory?

[13] Mr. Khoury has provided no evidence of how his appeal would be stifled or rendered nugatory if a stay is not granted.

Balance of Harm

[14] Mr. Khoury states that he will suffer prejudice if a stay of proceedings is not granted because:

(1) the claimant may request judgment in default of defence;
(2) unnecessary costs may be incurred if the appeal is successful;
(3) any minimal wait would not be prejudicial to the claimant; and
(4) the asset, which the claimant purports to have in the jurisdiction, is not readily available to satisfy any award of damages.

The Risk of A Request for Judgment in Default Being Made

[15] Mr. Khoury contends that if he files a defence he will be conceding or waiving his position that the court has no jurisdiction. The cases of Sean McLaughin v Montserrat Development Corporation et al [3] and Hoddinott v Perisson Homes (Wessex) Ltd.[4] are cited in support of this proposition.

[16] I am not of the view that the filing of a defence in the circumstances of this case would amount to a concession that the court has jurisdiction. Mr. Khoury made an application for an order declaring that the court has no jurisdiction. His application was dismissed and he was ordered to file a defence within 28 days. He has a pending appeal against the decision. The filing of a defence would be pursuant to an order of the court and thus in my view this ought not to amount to waiver of Mr. Khoury's position with respect to jurisdiction. The cases of Sean McLaughin and Hoddinott

[3] MNIHCV2016/0006
[4] [2008] 1 WLR 806.

are in my view distinguishable. In neither case was there an order directing the defendants to file a defence.

[17] In any event, as submitted by Queen's Counsel for Ms. Khoury, it is open to Mr. Khoury to state clearly in his defence that he is filing it pursuant to the order of the court and that the filing of same does not constitute a waiver of his position with respect to jurisdiction.

[18] More significantly, it appears to me that the risk of a request for judgment in default being made and possibly granted has been created by Mr. Khoury. If Mr. Khoury believes that he has good reasons for delaying filing his defence there is no evidence of anything preventing him from making an application for an extension of time to file a defence and thus preserving his position.

Costs Being Incurred if Appeal is Successful

[19] Mr. Khoury contends that he will incur the costs of proceeding with this matter if a stay is not granted. On the other hand, Ms. Khoury contends that the filing of a defence would not bring the proceedings to an end and Mr. Khoury can only be prejudiced by incurring costs if the stay is refused and the Court allows the appeal. Any prejudice can be adequately compensated in damages.

[20] In Nawab Sidhee Nuzur Ally Khan v Rajah Oojoodhyaram Khan[5] the Privy Council was considering an application for a stay of proceedings. Lord Chelmford stated:

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> "*Now, with regard to any suggested injury which may arise to the Petitioner in case the delay asked for is not granted, there is no ground whatever for supposing that any such injury will be sustained. All that he can allege is, that he may be put to costs upon the trial of these issues of fact remitted to the Zillah Court, supposing ultimately the decision of their Lordships on the appeal now pending in this Court should be in his favour, upon the questions of law*

[5] (1865) L.R. 1 P.C. 8

which it is said are raised therein. But the answer to that objection, if it be one, is, that if the Petitioner is put to costs improperly, those costs will ultimately fall on the Respondent while, on the other hand, the situation in which the Respondent would be placed, if their Lordships were to grant this application, must be considered…Therefore, with respect to any supposed injury which would arise from the cause being allowed to take its course, and the issues of fact allowed to be tried in due form in the Zillah Court of Midnapore, there is no pretence for saying that any such injury will arise.

[21] I adopt the reasoning of Lord Chelmsford that any costs to which Mr. Khoury is put to improperly if a stay is not granted and his appeal is successful could fall on Mrs. Khoury. In Royal Brompton Hospital NHS Trust v Chettle and others [6] the issue arose whether the plaintiff was liable for costs incurred for the hearing of an application for a stay filed by the defendant. Aldous LJ noted :

"

"*the Plaintiffs knew that if the appeal succeeded the action would be struck out and that all the costs incurred pending the appeal would be wasted. Despite that they decided that it was in their interest to proceed with the action pending the appeal and to resist an application for a stay."*

[22] The Court held that:

"

"A party who proceeded with an action pending an appeal seeking to have the action struck out did so at his own risk as to costs. Thus, if he proceeded and the appeal succeeded, it would normally be appropriate for him to bear all the costs of the action which had been reasonably incurred by the appellant during the period when the appeal was pending. In deciding whether such costs had been reasonably incurred, the court had to consider all the circumstances. In the present case, the defendant had acted reasonably when he applied on 6 June for a stay. It followed that the plaintiff should pay the costs of that hearing because they were in effect part of the costs of the action incurred during the period pending the appeal."

[6] [1997] All ER (D) 33

[23] In any event, in all cases where a stay of proceedings is not granted there is a risk that costs will be wasted if the judgment is overturned on appeal. In the circumstance, it appears to me that for the risk of costs being wasted to have any significant weight in the balancing exercise it should be established that the costs likely to be wasted are substantial in all the circumstances. The proceedings are at the stage of pleadings. There is no evidence that the costs which would be incurred would be substantial if a stay is not granted or that Mr. Khoury would be unable to meet these costs.

Delay

[24] Mr. Khoury contends that the loan forming the subject matter of this claim dates back to 2001. He states that Ms. Khoury *"waited for such an extended period before making the allegations of her claim (which are in any event denied). Any minimal wait for the hearing of my …appeal cannot in the circumstances be considered unreasonable or prejudicial to the claimant*." Further, leave to appeal has been granted and he anticipates that the appeal will be heard at the earliest opportunity.

[25] Ms. Khoury contends that she is 83 years old and if a stay is granted she will be "*denied a speedy resolution of the proceedings and also the fruits*" of her "*success in the 11th May 2016 judgment.*" The debt owed to her by Mr. Khoury has been outstanding for almost three years and the continued delay adds to the prejudice she will face especially due to her age.

[26] Queens Counsel for Ms. Khoury submitted that while the loan was made in 2001 the cause of action under the loan agreement only accrued within the last few years.

[27] There is no evidence that the Court has fixed a date for hearing of the appeal or of the likely timeframe within which the appeal will be heard. I am therefore unable to determine how soon the appeal is likely to be heard and thus the extent of the delay which will be suffered.

Assets Within the Jurisdiction

[28] Mr. Khoury contends that the property which Mrs. Khoury relies upon to assert that she has sufficient assets within the jurisdiction to readily satisfy any compensatory award in damages is subject of another litigation brought by the claimant and his brother against him and a company. He states that the matter has not reached trial and thus the property cannot be considered an asset readily available. Additionally, First Caribbean International Bank Limited (FCIB) has a charge over the property and thereby has a priority interest in the said property.

[29] Mrs. Khoury has stated that the property is readily available to satisfy any order for damages. Mr. Khoury disputes this. Mr. Khoury has not provided any evidence of the nature of the proceedings which he asserts the property is the subject of. It is not clear whether the nature of the proceedings are such that Ms. Khoury is at risk of losing part or full ownership of the property. There is also no evidence of the value of the property, the quantum of the alleged charge which FCIB has over the property or the quantum of likely damages which the defendant asserts the property will be unable to satisfy. I am therefore not satisfied that the property owned by the claimant is of insufficient value or not readily available to satisfy an award of damages.

[30] In any event, if Mr. Khoury's appeal is successful in that the Court finds that it has no jurisdiction then Ms. Khoury would be liable to Mr. Khoury in costs. Even if Mr. Khoury had established on a balance of probabilities that Mrs. Khoury has insufficient assets in the jurisdiction to satisfy a costs order there is no evidence that Mr. Khoury would be unable to or face serious obstacles in enforcing a costs order against Ms. Khoury in the United States of America where she resides.

[31] It is clear that if a stay is granted Ms. Khoury will suffer an unknown period of delay in the progression of her claim. Apart from the risk of incurring unnecessary costs, which is common to all cases where a stay is refused, Mr. Khoury has failed to satisfy me that he will suffer any serious injury or prejudice if a stay is not granted.

Prospects of Success of the Appeal

[32] An applicant must show that there are strong grounds of appeal or a strong likelihood that the appeal will succeed. Mr. Khoury has exhibited his grounds of appeal and submits that he has met the threshold since he has been granted leave to appeal.

[33] Queen's Counsel for the claimant submits that merely attaching the grounds of appeal is not sufficient to show that there is a strong likelihood that the appeal would succeed. Further, for leave to appeal to be granted it only has to be established that there is some prospect of success.

[34] With respect to test for granting leave to appeal In Enzo Addari v Edy Gay Addari Rawlins JA states:

> *"…it is trite law…that leave to appeal will be granted if this court is of the view that the appeal has a realistic prospect of succeeding or if there are other compelling reasons why the appeal should be heard"*

[35] Thus while the test for granting leave to appeal is that the applicant must show "*a realistic prospect of success"* for a stay of proceedings to be granted an applicant must satisfy a more stringent test and show *" a strong likelihood that the appeal will succeed."* The fact that the defendant was granted leave to appeal does not of itself mean that he has satisfied the requirement of showing that there is a strong likelihood that his appeal will succeed.

[36] While the granting of leave to appeal indicates that the Court of Appeal found that Mr. Khoury has an arguable case, I am unable to determine that the appeal has a strong likelihood of success simply by looking at the grounds of appeal attached to the affidavit of Mr. Khoury since the facts and law in support have not been disclosed. Thus for example grounds 1 and 2 of the appeal are that the learned trial judge erred in finding that the appellant's application disputing jurisdiction was not properly before the court and was outside of the time specified by CPR 9.7 (3). The learned trial judge referred to CPR 9.7 (1) (2) and (3) which states, inter alia, that an application disputing the court's jurisdiction must be filed within the period for filing a defence. The court found that

having regard to the date of service of the claim and the fact that nowhere on the court's record was it shown that : (a) there was an application for an extension of time to file a defence ; or (b) there was a an agreement for an extension of time to file a defence pursuant to CPR 10.3 (5) the application disputing jurisdiction was not filed within the time for filing the defence.

[37] Based on the facts as found by the learned trial judge I find the learned trial judge's reasoning sound. It may very well be that the facts as found may not be accurate but Mr. Khoury has failed to present any evidence of the facts being relied upon to support the contention that the learned trial judge erred in her findings of fact and law on this issue. In the absence of such evidence how is the court to determine whether the appeal has strong prospects of success?

[38] In the circumstance Mr. Khoury has failed to satisfy me that his appeal has a strong likelihood of success.

[39] Having taken into consideration all the circumstances, weighed all the factors and borne in mind that a stay should only be granted where there are exceptional circumstances I am not satisfied that the evidence before the court establishes any exceptional circumstances justifying the grant of a stay. The application for a stay of proceedings is therefore refused.

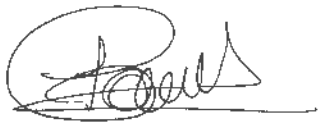
Costs

[40] This is not an application decided at a case management conference. I award assessed costs to Ms. Khoury pursuant to CPR 65.11.

[41] CPR 65.11 (4) states that:

> "In assessing the amount of costs to be paid by any party the court must take into account any representations as to the time that was reasonably spent in making the application and preparing for and attending the hearing and must allow such sum as it considers fair and reasonable.

[42] If the parties are unable to agree on costs within 21 days the parties shall make written representations with respect to the quantum of costs that should be awarded to Ms. Khoury.



Fidela Corbin Lincoln
Master