THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

CLAIM NO. 86A OF 2004

IN THE MATTER OF EASTERN CARIBBEAN SUPREME COURT (SAINT VINCENT AND THE GRENADINES) ACT CHAPTER 18 OF THE LAWS OF SAINT VINCENT AND THE GRENADINES REVISED EDITION 1990 SECTION 76 AND PARAGRAPHS 3 AND 4 OF BARRISTERS AND SOLICITORS BOOKLET 4

AND

IN THE MATTER OF UNPROFESSIONAL CONDUCT BY OTHNEIL R. SYLVESTER A BARRISTER AND SOLICITOR

AND IN THE MATTER OF THE APPLICATION FOR A RULE TO ISSUE TO OTHNEIL R. SYLVESTER BARRISTER AND SOLICITOR TO SHOW CAUSE WHY HE SHOULD NOT BE SUSPENDED OR STRUCK OFF THE ROLL OF BARRISTERS AND SOLICITORS

AND

IN THE MATTER OF THE APPLICATION OF FAELESSEJE A PRIVATE COMMERCIAL FOUNDATION OF DENMARK

FAELESSEJE	JUDGMENT CREDITOR
-AND-	
LESLINE BESS (Court Appointed Representative of the Estate of Othneil R. Sylvester Deceased)	JUDGMENT DEBTOR
-AND-	
AQUADUCT LIMITED	APPLICANT/INTERESTED PARTY
-AND-	
BERTILLE DA SILVA	APPLICANT/INTERESTED PARTY

Appearances: Mr Richard Williams for the Claimant/Applicant; Mr Parnell Campbell Q.C. and with him Mr Samuel Commissiong and Mrs Kay Bacchus-Browne for the Estate of Othneil Sylvester. (Mr Commissiong representing the Estate and Mrs Bacchus-Browne, the beneficiaries of the estate); Mr Graham Bollers for Mr Peter Alexander, Receiver of the assets of Mr Othneil Sylvester, deceased; Mr Frederick Gilkes, Mr Stephen Huggins, Ms Paula David and Mr Yuri Ronald Saunders for Aquaduct Limited and Mr Bertille Da Silva.

2014: Nov. 24, 25

Decision

[1] **Henry, J. (Ag.):** This is an application by the Applicants/Interested Parties/Intended Appellants[1] for an Order that the proceedings to determine the substantial factual dispute which has arisen in the course of proceedings under Part 48 of the Civil Procedure Rules 2000 ("CPR 2000") regarding the beneficial shareholding by the judgment debtor in the Company Aquaduct Limited, be stayed and/or suspended." The applicants seek an Order staying or suspending those proceedings:

> (i) until the hearing of the Applicant's application filed on November 11, 2014 seeking leave of the Court of Appeal to appeal against a ruling "dismissing the Applicant's preliminary objection to the court's jurisdiction to determine the factual dispute under Part 48 of the CPR 2000; and
>
> (ii) until the hearing and determination of the substantive appeal,

[1] Aquaduct Limited and Bertille Da Silva (referred to hereafter as the Applicants

in the event that leave to appeal is granted.

BACKGROUND

[2] By Notice of Application filed in February 2004, the judgment creditor[2] initiated proceedings in the High Court applying for a rule to issue to Mr Othneil Sylvester deceased to show cause why his name should not be struck off the roll of Barristers and Solicitors or why he should not be suspended from practising in Saint Vincent and the Grenadines. The disciplinary tribunal before whom the proceedings were conducted rendered its decision on May 27, 2007 disbarring the late Mr Sylvester and ordering him to pay to the judgment creditor the sum of EC$5,212,500.00 with interest and costs. Mr Sylvester appealed against that decision *inter alia* on the ground that the tribunal had no jurisdiction to order the payment of compensation. The Court of Appeal in its decision delivered on November 10, 2008 dismissed the appeal and affirmed the order of the tribunal for the payment of compensation to the judgment creditor by Mr Sylvester.

[3] By Order of the High Court dated November 22, 2012 Madam Justice Gertel Thom (as she then was) made an order *inter alia* that all of the judgment debtor's shareholding and interest in Aquaduct Limited "is to be applied towards satisfying the Judgment Debt." The Judgment Creditor applied[3] to the High Court for a Provisional Charging Order on 50% "share and or interest" in Aquaduct Limited,

[2] A private Danish corporation

[3] By Without Notice Application filed on November 28, 2013

in satisfaction of the judgment debt. The Application was supported by Affidavit of Mr Sten Sargeant (filed on November 28, 2013) who averred that the judgment debt at that date amounted to $10,259,335.00[4]. He also deponed that the judgment debtor's estate is beneficially entitled to at least 50% share and or interest in Aquaduct Limited. By Provisional Charging Order dated December 16, 2013 Madam Justice Gertel Thom (as she then was), having considered the application ordered that:

> "Unless sufficient cause to the contrary be shown ... the Respondent's[5] interest in the securities described in the Schedule... shall, and it is ordered that in the meantime the securities, stand charged with the payment of $10,259,335 due on the said judgment together with further interest becoming due as of 19th November 2013 at the rate of $714.04 per day and the cost of the application."

The Schedule states simply:

> "(a) 50% Shares and or interest in Aqueduct Limited."

[4] The Applicants/Interested Parties filed on January 31, 2014 a Formal Objection to the Granting of a Final Charging Order pursuant to Rule 48(8)(2) of the CPR 2000. Ground 1 of the Objection is to the effect that the judgment debtor "does not now nor did he ever own 50% shares and or interest in Aquaduct Limited". Mr Bertille Da Silva and Mr Casper Da Silva swore and filed affidavits on January 31, 2014 in support of the Objection. When the matter next came on for hearing on July 17, 2014, the Applicants/Interested Parties took a preliminary point to the court's jurisdiction. The court on that occasion gave directions *inter alia* for the filing of Affidavits by Aquaduct Limited and the executor of the judgment debtor's estate outlining the respective shareholdings in the company and providing details relating to the contributions by shareholders in acquisition of the company's assets. On the next adjourned date, on application by Aquaduct

[4] Including interest and costs

[5] Judgment debtor in this matter

Limited, an Order was made granting it *inter alia*, extension of time to the company to comply with the Court's Order to file the Affidavit evidence. The Claimant/Judgment creditor was also granted leave to file Affidavit in response. On the next adjourned hearing on October 16, 2014, the matter was adjourned until October 28, 2014, on application by the Applicants/Intended Appellants.

[5] On October 28, 2014, the Applicants/Intended Appellants again raised the preliminary point originally raised on July 17, 2014 that the court had no jurisdiction to proceed with the hearing. The hearing proceeded on October 28 and 29, 2014 with two witnesses being called. It was adjourned on October 29, 2014 to November 24, 2014.[6] The Applicants/Intended Appellants on November 14, 2014 filed an *ex parte* application for consideration by the Court of Appeal, in which they are seeking leave to appeal against the ruling regarding the court's jurisdiction. That Application has not yet been considered by the Court of Appeal. By Notice of Application on November 21, 2014 and supported by Affidavit of Mr Bertille Da Silva filed on the same date, the Applicants/Intended Appellants seek a stay or suspension of the present proceedings pending determination of the Application for Leave and ultimately of an Appeal in the event that leave is granted to appeal. The Claimant/Judgment Creditor, Judgment Debtor and the Receiver oppose the application.

APPLICATION FOR STAY OF PROCEEDINGS – GROUNDS AND EVIDENCE

[6] The Applicants Aquaduct Limited and Bertille Da Silva have applied pursuant to Part 26.1 (2) (q) of the CPR 2000 and the inherent jurisdiction of the Court, for the Order sought herein. The grounds of the Application are:

> "1. On October 28, 2014 the Applicants, at the continuation of the hearing of the charging order proceedings herein, took a preliminary point that a substantial factual dispute had arisen in the course of the said proceedings as to the Judgment Debtor's ownership of the shares sought to be charged and submitted that once such a factual dispute had arisen, the Court had no jurisdiction to dispose of the dispute summarily in the course of the said proceedings but was required to give directions

[6] With the concurrence of the parties, the court scheduled and reserved four days November 24, 2014 through November 28, 2014 for continuation and completion of the hearing.

for the determination of the said dispute between the relevant parties and adjourn the hearing of the charging proceedings to abide the determination of the said dispute.

2. On October 28, 2014 Her Ladyship dismissed the said preliminary point and embarked upon a summary determination of the said dispute in the course of the said charging proceedings and heard evidence from the Judgment Creditor and one of the Applicants Mr. Bertille Da Silva, a shareholder of the Company.

3. On November 11, 2014, the Applicants applied to the Court of Appeal for leave to appeal against Her Ladyship's order of October 28, 2014. The grounds upon which leave is sought are as follows:

    a. That the Honourable judge erred, in fact and in law, when she found, on October 28, 2014, that she had impliedly ruled on the said preliminary point on July 17, 2014, when she gave directions in the said proceedings for the filing of affidavits on behalf of the Company;

    b. The Honourable judge erred, in law in failing to take a point as to the jurisdiction that has been vested in her by Part 48.8 of the CPR regarding the manner in which she is to dispose of a substantial dispute that arises in proceedings commenced under Part 48 of the CPR as to the ownership of shares sought to be charged in pursuance of the said Part of the CPR;

    c. The Honourable Judge erred in law in failing to appreciate that when, in proceedings brought by a judgment creditor under Part 48 of the CPR to charge shares owned by a judgment debtor, a substantial dispute arises as to the ownership of the said shares, she may not attempt to determine the issue summarily in the course of the said proceedings, but rather, direct an issue to be tried between the persons contesting the ownership of the said shares and postpone the determination of the charging proceedings brought under the said Part until such time as such issue has been determined;

d. The Honourable Judge erred in law when she failed to appreciate that the parties contesting the ownership of the shares sought to be charged in the said proceedings were the Judgment Debtor, the Estate of Othneil Sylvester, deceased, and Mr Bertille Da Silva and that she should have given directions for the issue as to the ownership of the shares to be tried between those parties alone;

e. The Honourable Judge erred in law when she gave directions that the issue as to the ownership of the shares sought to be charged in the said proceedings under Part 48 of the CPR be determined in the course of the said proceedings, and allowed the Judgment Creditor, the receiver of the estate of Othneil Sylvester, deceased and a beneficiary of the estate to participate in the proceedings to determine the ownership of the shares;

f. The Honourable Judge erred in law in when she gave directions for the determination of the issue of ownership of the said shares by way of affidavits filed on behalf of persons interested in the said charging proceedings, containing hearsay evidence with inadmissible documents annexed thereto, produced in purported fulfillment of the duty to disclose, and allowing the several parties interested in the proceedings under Part 48 of the CPR to cross-examine the witnesses for the Proposed Applicants and indeed adduce evidence by way of cross-examination of interested parties who obviously share a common interest in the proceedings through leading questions put in the course of such cross-examination;

g. The Honourable Judge erred in law when she failed to appreciate that the important issue of ownership of the shares sought to be charged in the said proceedings under Part 48 of the CPR ought, fairly and properly to be tried with the formality of pleadings that define the issues between the persons who ought properly to be parties joined on the said issues, the formal disclosure of documents, witness statements based on first hand evidence and containing only such matters as the

parties have put in issue by way of pleadings in the matter.

4. The Appeal stands a real prospect of success for the reasons set out in the Grounds of Appeal. The application for leave to appeal has been listed for hearing on December 18, 2014 but the Applicants have applied to the Court of Appeal for urgent consideration of the Application for Leave, in the interest of having the Court of Appeal deal expeditiously with the substantive appeal.

5. The hearing of the summary proceedings to determine the said dispute which has arisen in the course of these proceedings under Part 8 of the CPR is scheduled to continue before Her Ladyship during the period November 24 – 27, 2014.

6. There is a real risk of injustice to the Applicants if a stay is not granted. The substance of the Applicant's Appeal relates to Her Ladyship's determination that she had jurisdiction to hear and determine, summarily, a substantial factual dispute as to the ownership of the subject matter of the charging proceedings. If the hearing that is scheduled to continue between November 24 and November 28, 2014 is not stayed, the various parties, including the Applicants, would incur substantial costs and considerable judicial time would have been expended in a cause up (sic) which the Court of Appeal may find, Her Ladyship ought not to have embarked.

7. The prejudice to FAELESSEJE *("the Judgment Creditor")* and/or Lesline Bess (*"the Judgment Debtor"*) if the Part 48 proceedings are stayed is minor. The Judgment Creditor has had almost 8 years to enforce its judgment against the Judgment Debtor, the date of the award being May 29, 2007. These proceedings under Part 48 of the CPR, in which the Order was made and from which the Applicants seek leave to appeal, were commenced on November 28, 2013. The staying of the Part 48 proceedings for the determination of the Applicant's appeal would cause a comparatively minor delay in the enforcement of the Judgment Creditor's judgment since it became enforceable on May 29, 2007."

Evidence for the Applicants

[7] Mr Bertille Da Silva swore to an Affidavit in support of the Application on November 21, 2014 filed on the same day. In it he deponed that the Affidavit is

made on his behalf and also on behalf of the Applicant Company Aquaduct Limited. He rehearsed the basis of the application for leave to appeal, being the ruling on the preliminary point. He also gave evidence as to the substance of the ruling, the fact that the hearing proceeded on October 28, 2014 with evidence being led from the judgment Creditor and him. He also attested to the fact that an application is pending before the Court of Appeal for leave to appeal and listed the grounds on which leave to appeal is being sought. He expressed the opinion that the Applicants' appeal has a real prospect of success and indicated that the Court of Appeal has been asked to dispose of the matter expeditiously.

[8] Paragraphs 8 and 9 of his Affidavit are relevant and are set out fully. They read:

> "8. I am further advised by Counsel, Mr Frederick A. Gilkes, and verily believe that there is a real risk of injustice to the Applicants if the stay is not granted as the substance of the Applicants' appeal relates to Her Ladyship's determination that she had jurisdiction to hear and determine, summarily, a substantial factual dispute as to the ownership of the subject matter of the charging proceedings. Mr Gilkes also advises and I verily believe that if the hearing that is scheduled to continue between November 24 and November 28, 2014 is not stayed, the various parties, would incur substantial costs and considerable judicial time would have been expended in a cause up (sic) which the Court of Appeal may find, her ladyship ought not to have embarked.
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> 9. The prejudice to FAELESSEJE *("the Judgment Creditor")* and/or Lesline Bess (*"the Judgment Debtor"*) if the Part 48 proceedings are stayed is minor. The Judgment Creditor has had almost 8 years to enforce its judgment against the Judgment Debtor, the date of the award being May 29, 2007. These proceedings under Part 48 of the CPR, in which the Order was made and from which the Applicants seek leave to appeal, were commenced on November 28, 2013. The staying of the Part 48 proceedings for the determination of the Applicant's appeal would cause a comparatively minor delay in the enforcement of the Judgment Creditor's judgment since it became enforceable on May 29, 2007."

Evidence for the Judgment Debtor

[9] By Affidavit filed on November 24, 2014, Nicole Sylvester deponed to matters on behalf of the Estate of the Othneil Sylvester deceased and on her behalf as a beneficiary of the estate. In it she addressed and attacked the form of the "purported applications for leave to appeal," maintaining in essence that it is an abuse of the process of the court and irregular for several reasons. The relevant paragraphs of her affidavit for the purposes of this application are 4, 5, 6, 7, 8, 9, 10, portions of 11, 14, 15, 16, 18, 19, 20, 21, 22 and 23. Ms Sylvester's observations and challenges can be summarized as follows:

1. The "purported" application for leave to appeal is irregular, has no legal basis, is an abuse of the process of the court and shows no real prospect of success because:

    a. it is intituled in the High Court and not the Court of Appeal[7], is incurably bad as it fails to disclose any grounds of application and fails to comply with the rules and well established principles of law and procedure for seeking leave to appeal;
    b. it fails to set out reasons for leave to appeal, instead cataloguing grounds of appeal;
    c. the issue as to jurisdiction is a procedural one, mandating filing of appeal within 7 days of the ruling[8], and that period has been exceeded by the Intended Appellants;
    d. even if the appeal is not procedural the period for appealing has been exceeded;
    e. even if the ruling appealed from was rendered on October 28, 2014 and not July 17 the period for appealing has been exceeded; and
    f. the applicants had ample time to appeal the court order.

2. As beneficiary of the judgment debtor's estate, she would suffer grave prejudice and injustice by further delay in the proceedings if the proceedings are stayed, in particular that the estate incurs a daily interest rate of $714.00 and is deprived of utilizing the judgment debtor's assets to settle his debt.[9]

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[7] Paragraph 4

[8] i.e. 7 days after July 17, 2014

[9] This presumably refers to the daily accrual rate of interest on the judgment debt.

3. No appeal has been lodged in this matter, no special circumstances are deposed to in Bertille Da Silva's affidavit to move the court's discretion. Even if there is an appeal, it would not operate as an automatic stay.

4. The applicant has failed to provide full, frank and cogent evidence showing special circumstances to move the court's discretion. The mere existence of arguable grounds is insufficient.

5. The applicant has failed to show what genuine and real prejudice he will suffer by continuation of the hearing.

6. In circumstances where the court has already started hearing evidence in this matter and there being only two more deponents to testify orally it would not serve the overriding objective, interest of justice and administration of justice to further delay this matter.

7. It is incorrect and misleading for the Applicants to persist in their allegations that these proceedings are being conducted in a summary manner, the court having considered that it had jurisdiction and gave directions for the resolution of the objections which could not have been resolved summarily.

ISSUE

[10] The sole issue which arises is whether the court should grant the application for stay or suspension of these proceedings to determine whether the judgment debtor holds 50% beneficial interest or shareholding in the Company pending determination of the:

1. Application for leave to appeal; and
2. appeal (if any).

SUBMISSIONS

By Applicants/Interested Parties

[11] Learned counsel, Mr Frederick Gilkes on behalf of Aquaduct Limited and Mr Bertille Da Silva submitted that the Applicants have filed an application before the Court of Appeal on November 11, 2014 against a ruling of the court made on

October 28, 2014. Learned counsel urged the court to consider the implications for everyone if the Court of Appeal rules that the complaint and prospective appeal of the applicants is a valid one. In those circumstances, the Court of Appeal he submits would direct that the current proceedings be set aside and order that a trial of the issues be embarked on in a manner which the Court of Appeal considers appropriate. He continued that precious judicial time would have been consumed and costs incurred by all parties in having their lawyers "agitating" their respective positions, only to have to start afresh. He conceded that the accrual of interest on the judgment debt is an obvious prejudice to the judgment debtor which must be weighed against the inconvenience to the parties should the applicants prevail before the Court of Appeal. In such a case, he submits that the judgment debtor would still face the same problem by having interest accrue further.

[12] Learned counsel Mr Gilkes contends that the fact that the judgment debtor initiated proceedings in December 2013 (some 6 years after interest began to accrue) demonstrates that this is something the judgment debtor has lived with since the death of the deceased so that the interest accruing in the interval between the hearing of the leave to appeal and eventual appeal (if any) would not be too high and should not significantly prejudice the judgment debtor. He submitted that the decision of Justice of Appeal Louise Blenman in **C-Mobile Service Limited v. Huawei Technologies Co. Limited**[10] is instructive in this regard as it sets out the principles which guide the court when considering an application for a stay of execution pending appeal. Those principles are outlined in paragraph 30 of that case where the learned Justice of Appeal rehearsed them approvingly as enunciated in the case of **Wenden Engineering Service Co. Ltd. v Lee Shing UEY Construction Co Ltd.**[11] as follows:

> a. The Court must take into account all the circumstances of the case.
> b. A stay is the exception rather than the general rule.
> c. A party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted.
> d. 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.
> e. the court should take into account the prospects of the appeal succeeding but only where strong grounds of appeal or a strong

[10] BVIHCMAP2014/0017

[11] HCCT No. 90 of 1999

likelihood the appeal will succeed is shown (which will usually enable a stay to be granted).

[13] Learned Counsel Mr Gilkes acknowledged that the applicants are at a disadvantage as they have "not yet" been granted leave to appeal. This is not a situation in which the subject matter of the appeal would completely disappear if the stay was not granted as the Court of Appeal would simply order a re-start of the proceedings if the appeal succeeded. He submits that in a charging proceeding the court labours under a difficulty as it does not know if the judgment debtor owns the shares. He maintains that the person who claims to own the shares ought to be directed to sue whoever he considers appropriate to obtain an order from the court declaring the owner. He argued that the objective of that suit would be to define the foundation of the judgment debtor's claim to the shares and identify what orders the judgment debtor is asking the court to make to give effect to that claim. He conceded also that the appeal would not be rendered nugatory if no stay is granted. Regarding the balance of harm aspect of his case, learned counsel Mr Gilkes stated that in the absence of a pronouncement from the Court of Appeal the applicants are at a disadvantage. He invited the court to look at the grounds of the intended appeal to assess whether they are arguable. He also indicated that no application is before the Court of Appeal to dispose of the application urgently. Mr Gilkes also submitted further that if the court made a ruling on the preliminary point in July 2014, the applicants were not aware of it and would be thereby prejudiced. He submitted finally that the applicants have made full and frank disclosure by exhibiting the transcript of the court's proceedings.

By Claimant/Judgment Creditor

[14] Learned Counsel Mr Richard Williams submitted that a certificate of urgency should have been filed with the application for leave to appeal and the documents should have been emailed the court's headquarters in Saint Lucia to ensure an expeditious disposal of the application. In any event, he submitted that the short service of the application can not be justified. He also contended that none of the principles highlighted in the **C-Mobile case** by learned counsel Mr Gilkes supports the applicant's case. He argued that the applicants have failed to advance any exceptional circumstances to move the court to exercise its discretion in their favour. He submitted also that the principle which favours the grant of a stay if an appeal would be rendered nugatory or stifled otherwise, does not apply to the instant case. He urged that the balance of harm and prejudice test rests with the estate of Othneil Sylvester deceased and the beneficiary of the estate, both of whom are losing $714.00 per day. The judgment creditor he contends is also being

frustrated in its efforts to recover a judgment debt granted since 2007. Mr Richards also urged the court to consider that 10 counsel and the court cleared their calendars for the matter to proceed and be completed this week and it would be counter-productive to grant the stay in those circumstances.

[15] Mr Williams also submitted that the applicable principles governing the stay of proceedings are not those set out in the **C-Mobile case** and that the principles governing a stay of proceedings and stay of execution are different. He referred the court to Halbury's Laws of England Vol. 37[12] where the learned authors state:

> "...an order for the stay of proceedings is made very sparingly and only in exceptional circumstances."

Finally, he submitted that the contents of paragraph 8 of Mr Da Silva's affidavit does not satisfy the test to demonstrate exceptional circumstances to support an application for a stay.

By Judgment Debtor

[16] Learned counsel Mr Commissiong indicated that he adopted fully the submissions of Mr Williams and the written submissions filed by Mrs Kay Bacchus-Browne. Mrs Bacchus- Browne filed written submissions on November 21, 2014 in response to the application for leave to appeal or stay of proceedings. She relied on them at the hearing and argued that there are two live issues before the court:

a. Whether there is a viable application for leave to appeal.
b. Whether a stay ought to be granted in the circumstances of the case.

She submitted that there is no application for leave to appeal known to law before the Honourable High Court and Honourable Court of Appeal. The documents filed by the intended Appellants masquerade as an application for leave to appeal but it is a mere paper writing of no legal effect that it fails to comply with the Rules of Court and well established principles for leave to appeal. She also maintained that the delay which would be occasioned by a stay would be highly prejudicial to the Estate of Othniel Sylvester deceased and his beneficiary and the application seeks to delay and deprive the Judgment Creditor from having access to the shares of Othniel Sylvester in Aquaduct Limited. Mrs Bacchus-Browne also submitted that on its face the application appears to be a consolidation of Claim 86A of 2004 and SVGHVCAP2014/017; is an abuse of the process of the court, is manifestly unfair

[12] 4th ed. 2001 para.926

to the parties in the case and is an attempt to frustrate and delay the just disposal of the charging order hearing.

[17] Learned Counsel Mrs Bacchus-Browne challenged the validity of the application for leave to appeal on several grounds including that the intended Appellants are woefully out of time since the Ruling being appealed was made on the 17th July 2014, the latest date for filing being the 1st day of August 2014. She further contended that this appeal is procedural and as such the Intended Appellant ought to have filed and served Written Submissions in support of its application and this ought to have been done within seven (7) days of the Order being appealed against that is by the 24th July, 2014 latest as stipulated in CPR 62.2(a), (b), (c), (d) and (e). In the premises the Applicants are out of time on both counts.

[18] Mrs Bacchus-Browne submitted that it is a well established principle of law enunciated by Lord Woolf MR in **Swain v. Hillman**[13]:

> *'that a real prospect of success means that the prospect of success must be realistic rather than fanciful. The Court does not examine whether the proposed grounds of Appeal will succeed, but merely whether there is a real prospect of success."*

She contended that the Court in determining an application for leave to appeal merely examines whether the Intended Appellant has an arguable case, fit to present to the Court of Appeal. In the instant matter the Intended Appellant's application for Leave to Appeal is out of time she maintained and there are no grounds of appeal exhibited except per force one is to extrapolate that the grounds of appeal are the intended grounds. In addition, she argued that the intended Appellants have failed to set out any or any cogent compelling reasons why the intended appeal should be heard at all. There has been no application made to extend time, for relief from sanctions and the Notice of Application filed on the 11th November 2014 is defective in that it does not contain any grounds for the Application and any special circumstances why leave ought to be granted to assist the Court in the exercise of its discretion.

[19] Mrs Bacchus-Browne also submitted that the general rule is that where an unsuccessful defendant seeks a stay of execution pending an Appeal to the Court of Appeal, it is a legitimate ground for granting the application that the defendant is able to satisfy the Court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success. The authority she cited **Linotype - Hell Finance Ltd. v. Baker.**[14] She maintained that the Court's power to grant a stay is made pursuant to **CPR 26.1 (2) (q)** as well as or as an alternative in its inherent jurisdiction. These powers are cumulative not exclusive. She urged that

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[13] **[2001] 1 ALL E.R. 91**

[14] **[1992] 4 All E.R. 887at 888 letter f-h.**

it is also important to be reminded of the Judicial Committee of the Privy Council's edict that the Court ought always first to rely on specific statutory provisions or Civil Procedure Rules first before seeking recourse to its inherent jurisdiction.

[20] Learned Counsel Mrs Bacchus-Browne submitted too that it is trite law that unless the Appeal Court or the lower Court orders otherwise, an Appeal does not operate as a stay of any order or decision of the lower Court.[15] She added that it is recognized that the Court has an unfettered discretion as to whether it will make an Order granting a stay of execution pending an appeal and as to the terms upon which a stay will be granted and as a rule, only grant a stay if there are special circumstances, which must be deposed to in an Affidavit.[16] The special circumstances which are of usual consideration she said are as follows a. Appeal would be nugatory if stay is refused. B. a successful litigant ought not to be deprived of the fruits of its judgment. Mrs Bacchus-Browne also urged the court that "summarily" is a term of art and as defined[17] is "a mode of dealing with certain matters expeditiously and without ordinary incidental formalities." The present proceedings she submits do not fall within that characterization.

[21] The approach to be adopted by the Court, on an application for a stay of execution she posited is outlined in several Court of Appeal cases.[18] In the **Marguerite Desir** case she stated that it was held *inter alia*:

> *"the Court's jurisdiction to grant a stay is based upon the principle that justice requires that the Court should be able to take steps to ensure that its judgments are not rendered valueless. The essential question for the court is whether there is a risk of injustice to one or both parties if it grants or refuses a stay. Further, the evidence in support of our application for stay of execution should be full, frank and clear. The normal rule is for no stay and if a court is to consider a stay, the Applicant has to make out a case by evidence which shows special circumstances for granting one. The mere existence or arguable grounds of appeal is not by itself a good enough reason.*

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[15] **CPR 62.15(1) and CPR 62.19.**

[16] ***See Halsbury's Laws of England/Civil Procedure Volume II [2009] 5th edition and Volume 12 [2009] 5th edition paragraph 1109-1836 – see paragraphs 1358,1359.***

[17] Words and Phrases Legally Defined 4th Ed. Vol. 2: L-Z

[18] **C-Mobile case supra, Marie Makhoul v. Cicely Foster HCVAP2009/04** at paragraphs 3 -5 of the Judgment; and **Marguerite Desir et al v. Sabina James Alcide HCVAP2011/0030**

Learned counsel Mrs Bacchus-Browne urged that it is imperative that this Honourable Court look in the round at all the circumstances of the case in considering whether there is a real prospect of success. She stressed that the onus is on the Applicants to adduce evidence to show that there is a risk of injustice to them if the stay is not granted. This evidence must be adduced in the affidavit in support of the application and must be full, frank and clear. She submitted that there is no such evidence and the Applicant cannot seek to do so by submissions.

[22] Mrs Bacchus-Browne reasoned that there is no real evidence of any risk of injustice that the Applicants would suffer if a stay of execution is not granted. On the other hand she submitted, the Respondent would *ex facie* suffer grave injustice. She submitted further that the **Applicant** has failed to meet the require threshold for the Court to exercise its discretion to grant a stay of execution based on the principles in the case **of Andrew Popely v. Ayton Ltd et al.**[19] a decision emanating from the High Court of Saint Vincent and Grenadines. Further and additionally the estate and beneficiary of the estate will be highly prejudiced if a stay is granted since the judgment attracts interest at a rate of $700.00 per day a factor the Court can take judicial notice of. The Judgment Creditor is also being deprived from accessing shares in a company which belongs to the Judgment debtor. She submitted also that the application ought to be struck out with costs in the sum of **$7,500.00.**

[23] Mr Bollers adopted the submissions made by Mr Richard Williams and also the written submissions by Mrs Kay Bacchus-Browne, and particularly their submissions that there was no material before the court on which to exercise the discretion to grant a stay except as set out in paragraph 8 of Bertille Da Silva's affidavit. He relied on the **Andrew Popely**[20] decision in support of his submission. Messieurs Richards, Commissiong and Bollers and Mrs Bacchus-Browne all indicated that they had no objections to short service of the application for the stay of proceedings and acquiesced in the hearing and conclusion of the application the same day.

LAW, ANALYSIS AND FINDINGS

[24] Part 1 of the CPR 2000 sets out the overriding objective of the rules. Rules 1.1 and 1.2 of CPR 2000 provide:

"1.1 (1) The overriding objective of these Rules is to enable the court to deal

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[19] **Claim No: SVGHCV 2005/01**

[20] Supra.

with cases justly.

(2) Dealing justly with the case includes –

(a) ensuring, so far as is practicable, that the parties are on an equal footing;

(b) saving expense;

(c) dealing with cases in ways which are proportionate to the –

(i) amount of money involved;

(ii) importance of the case;

(iii) complexity of the issues;

(iv) financial position of each party;

(d) ensuring that it is dealt with expeditiously; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other areas.

"1.2 The court must seek to give effect to the overriding objective when it –

(a) exercises any discretion given to it by the Rules; or

(b) interprets any rule." (underlining mine for emphasis)

[25] When taken and applied together, the overriding objective and the directive contained in rule 1.2 of the CPR compel the court to always dispose of matters as expeditiously as possible in all instances and specifically when it exercises a discretion under the Rules or interprets and applies any of the Rules. The principal objective is the just adjudication of the matter at hand with minimal cost and time and as effectively as possible. In determining the issues in the instant case those principles have been borne in mind and have been applied.

[26] Rule 26.1(2)(q) of CPR empowers the court to stay proceedings before it. It provides:

"Except where these rules provide otherwise, the court may –

(q) stay the whole or part of any proceedings generally or until a specified date or event;"

[27] Part 48 of the CPR authorizes the court to grant charging orders to secure the enforcement of judgment debts. Rules 48.5(1) and 48.8(4)(c) expressly empower the court to make a provisional charging order and a final charging order. The provide:

"48.5(1) In the first instance the court must deal with an application

for a charging order without a hearing and may make a provisional charging order.

48.8(4) At the hearing if satisfied that the provisional charging order has been served on the judgment debtor, the court has power to –
(a) discharge the provisional charging order;
(b) give directions for the resolution of any objection that cannot be resolved summarily; or
(c) make a final charging order."

Rule 48.8(5) is relevant to provide context and is set out below:

"(5) If the court makes an order under paragraph (4)(b), it may continue any injunction made under rule 48.5 until 7 days after the application is finally determined. (underlining mine for emphasis).

[28] Throughout the hearing of the present application and even on the face of the application, Learned counsel Mr Frederick Gilkes has consistently referred to the instant proceedings as summary proceedings under Part 48. This he has done notwithstanding that the court has never referred to them nor characterized them as summary proceedings and in fact page 8 of the transcript[21] at lines 11 to 17 state in part:

"I am satisfied that CPR 48.8 (4) confers jurisdiction on the court to embark on a hearing pursuant to directions issued under CPR 48.8 (4) to resolve any objection which ***could not be resolved summarily****. The Orders of July 17, 2014 and October ... are in the nature of such directions."* (bold and underlining for emphasis.)

Rules 48.8(4)(c) and 48.8(5) clearly contemplate that where directions are given under the former,[22] the issue of discharging or making the provisional charging order final is not resolved summarily, but must await the outcome of a hearing pursued in accordance with those directions, until final determination of the application objecting to the provisional charging order. A summary proceeding would conceivably arise in circumstances, *inter alia* where the person subject to the

[21] of the proceeding exhibited to Ms Sylvester's affidavit filed on November 24, 2014

[22] i.e. rule 48.8(4)(c)

charge cooperates with the court, concedes that the property is indeed owned by the judgment debtor or that he has a beneficial interest in it; or where the person subject to the charge provides irrefutable evidence that the judgment debtor has no interest in or does not own the property subject to the provisional charging order. Where there is a substantial dispute, the court may proceed to hear the matter after directions are given to the parties to govern the procedural and evidentiary aspects of the hearing. The instant case falls into this latter category.

[29] The Court of Appeal decisions in the cases of **Marie Makhoul**[23] and **Marguerite Desir v. Sabina James Alcide**[24] are authorities which rehearse the principles on which a stay of execution is granted. Those principles are set out in paragraph 12 above as extracted from the **C-Mobile Service Limited**[25] case provided by learned Counsel Mr Gilkes. The guiding principles can be summarized as requiring the court to:

(i) take steps to ensure that its judgments are not rendered valueless;[26] being mindful that "the normal rule is for no stay and if a court is to consider a stay, the applicant has to make out a case by evidence which shows special circumstances for granting a stay;"[27] in other words, the court must "hold a balance and give full and proper weight to the starting principle" that "there must be good reasons advanced for depriving a successful litigant from reaping the fruits of a judgment",[28]
The mere existence of arguable grounds of appeal is not enough, by itself, a good reason."[29]

(ii) be mindful that "a stay would normally be granted if the appellant would face ruin without the stay and that the appeal has some prospect of success; that it is not

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[23] ibid

[24] **HCVAP 2011/0030**

[25] supra

[26] **Marguerite Desir Case at para. 3** per Edwards C.J. (Ag.), (as she then was)

[27] ibid

[28] Per Justice George-Creque JA (as she then was) in the **Marie Makhoul case**, para. 3, and Edwards C.J. (Ag.) (as she then was) in the **Marguerite Desir case, para. 3**

[29] **Peggy Huggins and Others v. Jozeyl Morris, Saint Vincent and the Grenadines HCVAP 2008/009 (delivered 24th February 2009, unreported)** at para. 6, cited with approval by Edwards C.J. (Ag.) (as she then was) in the **Marguerite Desir case, para. 3**

enough to make a bald assertion to the effect that an applicant would be ruined. Rather what is required is evidence which demonstrates that ruination would occur in the absence of a stay;"[30] and

(iii) assess the evidence in support of the application to determine whether it is full, frank and clear; consider "whether there is a risk of injustice to one or both parties if it grants or refuses a stay;"[31] "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 able 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 from the respondent?"

[30] The undisputed facts in this matter have been set out in paragraphs 2 to 5. What is in dispute between the Applicants/Intended Appellants on the one hand and the Claimant/Judgment creditor, judgment debtor and Receiver on the other hand is whether the judgment debtor owns 50% of the shares in Aquaduct Limited. The Intended Appellants maintain that the judgment debtor does not and it is on this basis that they are seeking to have the provisional charging order discharged. The main issue before the court in the Part 48 proceedings is whether a factual and legal basis exists for either discharging or making the provisional charging order final. This is the factual matrix against which the guiding principles governing the grant of a stay of proceedings will be evaluated.

[31] Bearing in mind all of the circumstances of the case as laid out herein, including the varied interests of each party, the concessions made by the Applicants/Intended Appellants that the intended appeal will not be stifled or rendered nugatory unless a stay is granted and that the accrual of interest on the judgment debt is an obvious prejudice to the judgment debtor, the court must conduct a balance of harm test. In this regard, based on the evidence provided by the Applicants/Intended Appellants and the judgment debtor, it is clear that while the Applicants/Intended Appellants would suffer no harm if a stay was not

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[30] Per Staunton L.J. in **Linotype-Hell Finance Ltd. V. Baker [1992] 4 All E.R. 887** cited with approval by George-Creque JA (as she then was) in the **Marie Makhoul case at para. 4**

[31] Per Clarke L. J. in Hammond **Studdard Solicitors v. Agrichem International Holdings Limited [2001] EWCA Civ 2065 at paras. 13 and 22** cited with approval by Edwards C.J. (Ag.) in the **Marguerite Desir case at para. 3**

granted, the judgment debtor and the judgment creditor would suffer substantial harm financially, through loss of interest on the one hand and conceivably increased costs in both instances if the stay was granted. The balance of harm test favours the judgment debtor and the judgment creditor. The judgment debtor would suffer greater injustice if the stay was granted than the Applicants/Intended Appellants would if the stay was refused. There is no allegation by or evidence from the Applicants/Intended Appellants that they would suffer ruin if the stay was refused and I find that they would not be ruined or suffer harm.

[32] The Applicants/Intended Appellants list 7 grounds in their Application for leave to appeal. Grounds 1 to 3 are perhaps arguable, 4 and 5 are essentially the same grounds and disclose no arguable ground for an appeal arising from the ruling on the preliminary point. Grounds 5 and 6 raise evidentiary points which do not arise on the preliminary point against which the appeal is purportedly being pursued and can properly be taken only after a full ventilation of the Part 48 hearing and a decision rendered. In the round therefore, I am hard pressed to conclude that the grounds of appeal contain strong arguable legal points which suggest that the appeal will succeed. I find that while grounds 1-3 might disclose grounds for appeal, the mere existence of arguable grounds of appeal is not enough, and not a good reason to grant the stay on the facts of this case. Coupled with the irregularities and deficiencies in the procedure and form adopted by the Intended Appellants in prosecuting their application for leave to appeal, I am not satisfied that the Intended Appellants have met the benchmark for grant of a stay.

[33] In addition, on examining the evidence advanced by Mr Bertille Da Silva in his affidavit, he does no more than make a bald assertion that he believes that "there is a real risk of injustice to the Applicants if the stay is not granted ... and that if the hearing that is scheduled to continue between November 24 and November 28, 2014 is not stayed, the various parties, would incur substantial costs and considerable judicial time would have been expended; that the prejudice to FAELESSEJE *("the Judgment Creditor")* and/or Lesline Bess *("the Judgment Debtor")* if the Part 48 proceedings are stayed is minor." These statements when exposed against the true factual position of the parties demonstrate a lack of appreciation by the Intended Appellants of the hardship which the judgment debtor and judgment creditor might suffer if a stay is granted. The applicants have failed to make out a case by providing full, frank and clear evidence which shows special circumstances for granting a stay.

[34] Recognising that a stay is the exception rather than the general rule and being cognizant that the court must take steps to ensure that its judgments are not rendered valueless and that a successful litigant is not prevented from or frustrated in reaping the fruits of a judgment I find that the Applicants/Intended Appellants have failed to satisfy the court that a stay should be granted in the circumstances of this case.

[35] In all the circumstances of this case, the justice of the case demands that the hearing embarked on proceed without interruption by stay of the proceedings. To obviate any possible difficulty which might attend execution in the event of a successful appeal by the Intended Appellants the court is minded to take the evidence in this matter and delay the decision on the charging order pending the outcome of the appeal process.

ORDER

[36] 1. The application for stay of proceedings pending determination of the leave to appeal is accordingly refused.

2. The application for stay of proceedings pending appeal is also refused. The Part 48 proceedings will resume.

3. Decision will be reserved in connection with those proceedings pending the outcome of the appeal process.

4. The judgment debtor shall have costs of $7500.00.

[37] I am grateful to counsel for the assistance rendered in their written and oral submissions.

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Esco L. Henry

HIGH COURT JUDGE (Ag.)