JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS. 58 & 59/91

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

C/A 59/91

BETWEEN	LYLE BARNES	APPLICANT
AND	JOSCELYN BENNETTE DALTON BARNES MICHAEL BARNES	RESPONDENTS

C/A 58/91

BETWEEN	JOSCELYN BENNETTE DALTON BARNES MICHAEL BARNES	RESPONDENTS
AND	LYLE BARNES	APPLICANT

Dennis Goffe and Miss Minnette Palmer for Joscelyn Bennette et al Respondents

Berthan Macaulay, Q.C. and Alonzo Manning for Lyle Barnes Applicant

September 24, 25 & October 28, 1991

ROWE, P.

Chester Orr J. heard the consolidated actions in Suits C.L/87B084 and C.L/87B129 in which the parties were the applicants and respondents herein and gave judgment on July 26, 1991. In that judgment Lyle Barnes was ordered to pay to the respondents the sum of $3,221,985.00 and by Consent, execution was stayed in the following terms:

"By Consent - on application by Mr. Manning in Suit C.L. 1987/B129 stay of execution of order for payment of $3,221,985.00 is granted until August 9, 1991. Further stay of execution granted for a further 4 weeks provided the sum of $1.6 million be paid by the defendant Lyle Barnes to plaintiffs on or before August 9, 1991. "

Lyle Barnes did not make the payment to which he had consented as above. On August 14, 1991 he filed a Notice of Appeal against the whole of the judgment of Chester Orr J. and served a copy thereof on the Attorneys for the respondents on August 15, 1991 at 9.08 a.m. Lyle Barnes swore to an affidavit on August 12 in support of a summons for an order of stay of execution and this he filed together with his summons on August 14. As it was vacation time the affidavit pleaded as matters of urgency the fact that the applicants all lived outside the jurisdiction and that they had no substantial resources within Jamaica consequently they would not be in a position to provide security for the re-payment of the $1.6 million if the appeal succeeded.

The summons was set down for hearing on August 15, 1991. The applicant did not serve the summons or the affidavit in support thereof on the respondents or their attorneys-at-law. Wright J.A. heard the summons for stay of execution ex parte on August 15 and made the following order .

" UPON the Summons for Order made herein coming on for hearing on this day before the Hon. Mr. Justice Wright and after hearing Mr. Berthan Macaulay of Queens Counsel Ex Parte and with him Mr. Alonzo D. Manning, Attorney at Law for and on behalf of the Defendant/ Appellant IT IS HEREBY ORDERED :-

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> "Stay of Execution and all further proceedings in and following the said Judgment of the Honourable Mr. Justice Chester Orr given on the 26th July 1991 GRANTED as prayed on condition that the Appellant settle and file the Record of Appeal within Thirty (30) days from the date hereof and thereafter the Appeal be set down for hearing as a matter of priority. No Order as to Costs."

The respondents have moved to set aside this order for the stay of execution on two grounds: firstly, that the Judge of Appeal had no jurisdiction to hear the application for stay of execution ex parte and secondly, that in any event the Judge of Appeal should have refused to hear the application for a stay of execution as such application must be made in the first instance to the Court below:

Rule 22(1) of the Court of Appeal Rules, 1962, provides that:

> "Except as otherwise provided by these Rules every application to a Judge of the Court shall be by motion and the provisions of Title 40 of the Judicature (Civil Procedure Code) Law shall apply thereto."

Title 40 referred to above is headed: "Motions and other Applications". With some exceptions which are not material to these proceedings, Section 486 in that Title 40, states the general rule that "no motion shall be made without previous notice to the parties affected thereby." Section 489 provides the sanction for non-compliance with Section 486 in that it empowers a Judge either to dismiss the motion or adjourn the hearing thereof, when it appears to him that notice of the motion was not given to a person who ought to have received such notice.

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Rule 22(4) of the Court of Appeal Rules contains an important provision which governs access to the Court of Appeal in certain circumstances. It provides that :

> "Wherever under the provisions of the Law or of these Rules an application may be made either to the Court below or to the Court, it shall be made in the first instance to the Court below."

Mr. Goffe for the respondents, relied upon the provisions of Rule 22(4) for his submission that when the Consent Order granted by Chester Orr J.A. expired on August 9, 1991, the applicant ought to have made his application for extension of time to that same Judge or another Judge of the Supreme Court and only if such application was refused or granted in unacceptable terms, could the respondent renew his application before this Court. It was so decided by Swaby J.A. in Chambers in Beverley Shields v. Jennifer Graham [1974] 12 J.L.R. 1497. The facts of that case are indistinguishable from those in the instant case. There a stay of execution was granted by the trial judge on May 15, 1974 for six weeks to enable the unsuccessful party to file notice of appeal which she did on June 13, 1974. On June 25, 1974 the appellant filed a summons in the Court of Appeal seeking an extension of the stay of execution until the hearing of the appeal.

A preliminary objection was taken by the respondent's counsel on the basis that by Rules 21(1) and 22(4) of the Court of Appeal Rules, the application for stay of execution should be made to the Court below in the first instance. Swaby J.A. after considering Hill et al v Wallen [1973] C.A. (unreported) and Cropper v. Smith [1883] 24 Ch. D. 305, upheld the preliminary objection and refused the application. He said :

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> "I hold that the construction of the Rules in question contended for by the Appellant's counsel is incorrect. Rule 22(4) contemplates that at the time the application for stay of execution is made there should be in existence a pending appeal. In the absence of a pending appeal the application for a stay of execution for six weeks to enable the appellant to file her appeal made to the trial judge in this case was invoking the inherent jurisdiction of the court below, or statutory powers, not being those under the Court of Appeal Rules, 1962. .....
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> Now that there is an appeal pending an application for stay of execution (or further stay of execution) may be made either to the court below or to the Court of Appeal under rule 21(1), and rule 22(4) provides that where this is done, such application shall be made in the first instance to the court below.
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> In the result the preliminary objection is upheld, (and) the application is refused. ....."

Mr. Macaulay readily conceded that Shields v. Graham (supra) was correctly decided. But he contended that the application for a stay in the instant case was made under Rule 33(1) of the Court of Appeal Rules and not under Rule 22, and consequently the decision in Shields v. Graham (supra) is irrelevant to these proceedings. He submitted that the power to grant a stay of execution after an appeal is pending vests independently in the Court of Appeal and in a single Judge of the Court. This he said is demonstrated by the provisions in two quite separate Rules, viz. Rule 21 and Rule 33, and in respect of which there are substantial differences. An application under Rule 22 must be by motion whereas by Rule 34(2) an application under Rule 33 may be by motion or summons. The other point of departure relied on by Mr. Macaulay is the limitation contained in Rule 22(4) which is not repeated in Rule 33 or Rule 34. This led Mr. Macaulay to argue that an attempt by this Court to import into Rule 33 or Rule 34 the limitation contained in Rule 22(4) would amount to a

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usurpation of the functions of the legislature.

We accept as we must, the dictum of Lord Diplock in Baker v. R. [1975] A.C. 774 at 784 that:

> " To read into the Jamaican statute words that the Jamaican legislature has itself apparently rejected, so as to enable the Court to give to the statute an effect which it would not otherwise have, would be a usurpation of the functions of the Jamaican legislature."

We accept too the passage from the judgment of Lord Salmon on page 790 of the same report in Baker v. R. (supra) that:

> "The function of the court is to give effect to the intention of the legislature as expressed in the language of the statute under consideration. If the language is capable of bearing only one meaning then that is the meaning which the courts are bound to apply even if to do so leads to injustice. If however, as here, the language of the statute is, as I think, capable of two meanings, the court is free to decide which is the meaning intended by the legislature. Nevertheless, in making that decision, the court must first consider which of the two meanings is more consistent with a strictly literal construction."

The rule of construction which we think is most apposite to this case, is that which requires a statute to be construed as a whole. In its Seventh Edition of Craies on Statute Law, the learned authors say at p. 99:

> "This rule of construction, viz. exposition ex visceribus actus, has frequently been recognized and acted upon by courts of law from Coke's time down to the present day. In Brett v. Brett [1826] 3 Addams 210 at 216, Sir John Nicholl M.R. said as follows:
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> > The key to the opening of every law is the reason and spirit of the law; it is the animus imponentis, the intention of the law-maker expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, the particular phrase is not to be viewed detached from its context in the statute; it is to be viewed in connection with its whole

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> 'context, meaning by this as well the title and preamble as the purview or enacting part of the statute'. "

We did not derive any real assistance from a comparison of the 1883 Rules of the Supreme Court (England) with the Court of Appeal Rules, 1962 and no point will be served in further consideration of Mr. Macaulay's arguments based on the 1883 English Rules.

We must now examine Rules 21, 22, 33 and 34 of the Court of Appeal Rules 1962.

Rule 21(1)(a) is in these terms :

> "Except so far as the Court below or the Court may otherwise direct :
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> (a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the Court below ; "

Reference to "the Court" in the above Rule is a reference to the Court of Appeal. Consequently when Rule 22(4) speaks of "provisions of the Law or of these Rules", it impacts directly upon Rule 21(1)(a) where it is recognized that the Court of Appeal as well as the Court below can grant a stay of execution of a judgment or of the proceedings in a cause or matter. Rule 22(4) mandates that the application for a stay should first be made to the Court below.

Rule 33 confers upon a single Judge of the Court powers which would otherwise be exercisable only by the Court itself. But this Rule retains the paramountcy of the Court by providing in Rule 33(2) that :

> "Every order made by a single Judge of the Court in pursuance of this rule may be discharged or varied by the Court. "

It can be demonstrated that in relation to a stay of execution of a judgment there are not two independent jurisdictions as contended for by Mr. Macaulay. Shields v.

Graham (supra) must have been an application by virtue of Rule 33 because it was made to a Judge in Chambers and the process used was a summons. No one argued then that the Judge of the Court was being given a wider jurisdiction than the Court itself and that the provisions of Rules 21 and 22 were irrelevant to those proceedings. Further what would be the position if the Court was asked to vary or discharge an order made by the single Judge in circumstances where there had been no prior application to the Court below ? The Court which could not accept jurisdiction if the application for stay had been made direct to it by virtue of Rule 21(1)(a) and Rule 22(4) would now have jurisdiction because the single Judge had acted under Rule 33. When one bears in mind that the Court of Appeal is not given original jurisdiction under the Constitution or the Judicature (Appellate Jurisdiction) Act, and where there is a clear general provision in the Rules that whenever there is co-ordinate jurisdiction given by the Law or the Rules to the Court of Appeal and the Court below applications should be made first to the Court below, it would be wrong to hold that the decision in Shields v. Graham (supra) is limited to applications made to the Court itself under Rules 21 and 22.

We are of the view that whether an application for a stay of execution is made to the Court itself or to a single Judge of Court under the Court of Appeal Rules, 1962, the Court or Judge is governed by the provisions of Rules 21(1)(a) and 22(4) which require that such an application should first be made to the Court below.

Mr. Macaulay readily conceded that the order of Wright J.A. made on August 15, 1991 could not stand as it was obtained ex parte in circumstances where the Rules clearly required that the respondent should have been notified. By virtue of Section 406 of the Judicature

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(Civil Procedure Code) Law, a notice of motion for a stay of execution must be served on the party entitled to the fruits of that judgment. Any application whether by motion or summons to a single Judge of the Court under Rule 33 of the Court of Appeal Rules for a stay of execution must be served by virtue of Rule 34(2).

There was, therefore no jurisdiction in the single Judge of Appeal to hear this application ex parte. Accordingly we granted the application to discharge the Order of Wright J.A. granting a stay of execution.

FORTE J.A.:

I agree.

GORDON J.A.:

I agree.