[2024] JMCC Comm 46

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO.SU2022CD00331

BETWEEN	**ERROL BENNETT**	**CLAIMANT**
AND	**LHCC PERFECT HOMES LIMITED**	**1st DEFENDANT**
AND	**IAN K. LEVY**	**2nd DEFENDANT**

Mr Canute Brown instructed by Brown Godfrey & Morgan, for the claimant

Mr Weiden Daley instructed by Hart Muirhead Fatta, for the defendants

Heard July 17, 2024, October 9, 2024, and December 20, 2024

Stay of taxation proceedings pending appeal - Extension of time to file points of dispute - Whether points of dispute to be filed to permit such application - Whether application for extension of time to file bill of costs permissible under CPR 65 - CPR 65(18) – CPR 65(19) – CPR 65(20)

CORAM: JARRETT J

Introduction

1. On May 26, 2024, Barnaby J, dismissed the claim in **Errol Bennett v LHCC Perfect Homes and Ian Levy [2023] JMCC Comm 22,** by which the present claimant sought declarations that he has a right of way by way of an easement

over lands owned by the 1st defendant. Costs were awarded to the defendants to be agreed or taxed. Before me is the claimant's notice of application filed on February 23, 2024, by which he now seeks the following orders pertaining to Barnaby J's judgment: -

> "a) That he be granted an extension of time to file Points of Dispute, as the Paying Party in a Bill of Costs in the Claim herein served on the Applicant on 18th January 2024;
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> b) A stay of Taxation proceedings in the Claim pending the determination of an appeal against a judgment of the Supreme Court filed by the Applicant on 3rd February 2023;
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> c) That the Applicant be granted an extension of time to file a Bill of Costs in respect of an award of costs in proceedings for Summary Judgment in this claim, brought by the Second Defendant which was dismissed."

2. The claimant relies on the following three (3) grounds to support his application: -

> "a) The Claim against the Defendants was heard and determined on 3rd February, 2023[1], and judgment entered for the Defendants with costs to be taxed or agreed. The Defendants not having commenced taxation proceedings within three months of the said judgment, served the Notice and Bill of Costs on January 18, 2024, but the Applicant is unable to serve the Points of Dispute within 28 days of the date of service and seeks an extension of time to comply with the

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[1] The date of delivery of Barnaby J's judgment was actually May 26, 2023.

Rule as provided by Rule 26 of the Civil Procedure Rules 2002.

b) The Claimant has filed an appeal against the judgment and the appeal is pending. An appeal does not operate as a stay of taxation proceedings unless ordered by this Court or the Court of Appeal as provided by Rule 65.16 of the Civil Procedure Rules 2002.

c) The award of costs to the Applicant was not summarily assessed and the summary judgment application, being part of the proceedings in the claim, for the purposes of Rule 68.20 of the Civil Procedure Rules 2002, the claimant elected to delay the commencement of taxation proceedings until the claim was determined."

The background facts

3. I gratefully adopt the following background facts from the judgment of Barnaby J:-

> "[1] The Claimant is a businessman who claims to be the owner of a parcel of land in Negril, Westmoreland which he has occupied for more than thirty (30) years. He also alleges that the buildings on the land owned by him are occupied by tenants, licensees, and other persons with his permission. He has identified the "lands" as lots 26 and 28 of Strata Plan no. 380 in what is known as Plaza, Negril (hereinafter "the Strata"). The lots are registered at Volume 1213 Folio 663 and Volume 1213 Folio 665 of the Register Book of Titles in the names of Apanage Limited and Buccaneer Restaurant Limited respectively.
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> [2] The 1st Defendant is the registered proprietor and developer of lands registered at Volume 1122 Folio 493 (hereinafter called "the

Disputed Land"), Volume 1095 Folio 794 and Volume 1117 Folio 991 of the Register Book of Titles, which lands are cumulatively called the "the Developer's Lands" and are the construction site of what has been described as an upscale multiple-unit residential development. The Disputed Land is contiguous to the Strata and has upon it an access way (hereinafter called "the Disputed Road") to the Negril main road. The 2nd Defendant is a director of the 1st Defendant company.

[3] It is the Claimant's claim that the land which comprises the Strata and the Disputed Land were previously comprised in a single certificate of title being that registered at Volume 1122 Folio 493 of the Register Book of Titles, before subdivision and distribution to their respective registered proprietors. It is his claim that as the owner of the Strata he has an easement in the form of a right of way over the Disputed Road as it is the only means of access to the main road and is used by pedestrians, motorists and other members of the public who move to and from the Strata as visitors or licensees; and that he is entitled to the right of way because he has enjoyed it as of right and without interruption in excess of thirty (30) years before the filing of his claim in March 2017.

[4] It is further alleged that the Defendants wrongfully interfered and obstructed the said right of way by drilling holes across the Disputed Road, rendering it impassable on diverse days on or about 27th February 2017. It is the Claimant's contention that the acts of the Defendants have disturbed the enjoyment of his right of way, in consequence of which he has suffered loss and damage, which he particularised as loss of income suffered by tenants of the shops and the withdrawal of tenants from long term leases…

> [5] The Defendants deny the allegations of the Claimant and his claim to any of the reliefs sought or at all."

The evidence in support of the application

4. The application is supported by the claimant's affidavit filed on June 28, 2024**.** In that affidavit the claimant says that he filed an appeal against the judgment of Barnaby J on July 5, 2023, and a counter- notice of appeal was filed on July 17, 2023, by the defendants. He has been informed that the bill of costs exceeds the sum of $15,000,000.00, but he will be unable to pay that sum or anything near it. His only source of income is monthly rent from two tenants, who have notified him that they intend to pull out of the lease agreement because of difficulties with parking since the judgment of the court. Before the obstruction to the path he has been using for 30 years took place, the 1st defendant provided him with a draft plan of the boundaries and entrance area to their hotel, and the entrance area to his shops. He exhibits the plan and says he was not allowed to rely on it at trial because "it was said" that it was not disclosed. He says further that the shops are owned by him, he took possession of them in 1980 as a tenant of the then owner of the Plaza. He made the purchase after it became a Strata. If he is ordered to pay the costs, he would not be able to pursue his appeal as he would not be able to afford legal fees to pay his attorneys-at-law to prosecute the appeal. He has not yet been told how much in legal fees he will have to pay to his lawyers.

5. According to the claimant, the bill of costs is unreasonable. He brought the claim to have the court determine whether he has a right of way. He began the claim in the Parish Court but had to pursue it in the Supreme Court because the defendants took objection to the plaint due to the value of the property involved. The claim was not complex and was tried quickly. He did not bring a money claim and so it cannot be said that the costs are proportionate to the claim. He believes he has a good prospect of succeeding on appeal and the appeal and counter appeal should be heard before orders for recovery of costs are made. He received costs on an

earlier summary judgment application brought by the defendants which was dismissed, and he is seeking permission to deliver his bill of costs.

The evidence in response

6. The evidence in response is that of the 2nd defendant, who is a director of the 1st defendant. In an affidavit filed on April 12, 2024, the 2nd defendant exhibits a copy of the bill of costs and notice of points of dispute. He says that based on the affidavit of service of Teslyn Golding, he believes that these documents were served on the claimant's attorneys-at-law on January 18, 2024. His attorneys-at-law advise however, that points of dispute have not been filed in response.

Analysis and discussion

7. Counsel for the claimant, Mr Canute Brown argued that the applicant's primary focus is on the order for a stay, because if a stay is granted, then the order seeking an extension of time to file points of dispute falls away. No points of dispute were filed by the claimant up to the time of the hearing of this application. The claimant has also not exhibited to his affidavit, a copy of his grounds of appeal. There is no evidence in his affidavit addressing the basis of his appeal or indicating why he believes that his appeal has any merit. Given counsel's focus, I will start by considering whether a stay of the taxation of costs should be granted.

Should the taxation of costs be stayed

8. Mr Brown submitted that the immediate payment of costs by the claimant may result in grave injustice because he cannot pay it. According to learned counsel, paying the costs and funding the appeal will stifle the appeal. At the end of his oral submissions on the first day of the hearing, in response to the court's observation that the claimant has not provided any evidence of the merits of his appeal or for that matter the basis on which he is appealing the judgment, Mr Brown said that as the application is not seeking to stay an executory order, the primary issue the

court must consider is not whether the appeal has any prospect of success, but where the risk of injustice lies.

9. It is a well-established principle of law that costs follow the event. This simply means that the successful party is generally entitled to his costs. Where costs are awarded, they are to be taxed if not agreed. The order for costs made by Barnaby J is: "Costs *of the claim to the Defendants to be agreed or taxed."* Mr Brown is right to argue that this is not an executory order. CPR 65.16 however expressly provides that unless the court or the Court of Appeal so orders, taxation of costs is not stayed pending an appeal. It is the stay of the taxation of costs pending appeal that the claimant now seeks. I see no good reason why the same principles a court applies when considering an application for a stay of execution of a judgment pending an appeal, should not apply to an application to stay taxation pending appeal.

10. The authorities indicate that in determining whether or not to grant a stay of execution pending appeal, the court conducts a balancing exercise, and that the primary consideration is to make an order which comports with the interests of justice. What these authorities also demonstrate is that the search for the just order must include a consideration of whether the appeal has some merit. It seems to me that if an appeal has no prospect of success, it would certainly not be in the interest of justice to grant a stay and deny a successful respondent both the fruits of his judgment and the ability to have his costs taxed, to facilitate an appellant pursuing an unmeritorious appeal.

11. In **Carmen Farell and Ors v Lascelle Reid and Ors [2012] JMCA App 16**, a decision relied on by Mr Daley, Phillips JA in considering an application for the stay of execution pending appeal, of an order for the payment of costs, reviewed myriad authorities dealing with the principles to be applied on such an application. In the final analysis she said at paragraphs 33 and 34 that: -

"33. In this court there have been several cases where we have viewed the interests of justice as an overriding consideration (see **Reliant Enterprises Communications Limited and Anor v Infochannel Limited SCCA No 99/2009, Application Nos 144 and 188/2009 and Cable and Wireless Jamaica Limited v Digicel Jamaica Limited SCCA No 148/2009, Application No 196/2009 delivered 16 December 2009**)

34. The real questions for my deliberation therefore are is there an arguable appeal with some prospect of success; will the applicant suffer ruin; or will the appeal be stifled if the stay is not granted; what are the chances of having these costs refunded if the appeal is successful; is there a significant risk of injustice if the applicant was forced to comply with the order for costs."

12. In **Raju Khemlani v Suresh Khemlani [2019] JMCA App 17**, Foster Pusey JA, writing for the court, said this: -

> [46] The basis on which a stay of execution will be granted is well established. Queen's Counsel referred to the succinct statement of Phillips JA in the case of **Kenneth Boswell v Selnor Developments Company Limited** [2017] JMCA App 30. Phillips JA at paragraph [48] noted that the primary consideration for the court is:
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> > "…whether there is some merit in the applicant's appeal and whether the granting of a stay is the order that is likely to produce less injustice between the parties".

13. I am left with no doubt that in determining whether to grant a stay of execution, the approach is to grant the order which, according to Phillips JA in **Combi (Singapore) Pte Limited v Ramnath Sriram and Another [1997] EWCA 2164,** cited by McDonald Bishop JA (as she then was) in **ADS Global Limited v Fly Jamaica Airways Limited [2020] JMCA App 12** and relied on by Simmons JA in

Jamaica Public Service Company Limited v Rosemarie Samuels [2021] JMCA App 15: -

> "…best accords with the interest of justice once the court is satisfied that there may be some merit in the appeal".

14. In the application before me, there is not a hint of any evidence of the grounds of appeal or the basis of the appeal. Mr Brown remarkably suggested in his oral submissions that he assumed that the court would ferret out those grounds itself. In other words, having read the judgment, the court would naturally form a view of the possible grounds of appeal. When that submission found no favour with me, the further submission was that a court of coordinate jurisdiction really has no basis on which to comment on the merits of Barnaby J's judgement. After these latter submissions were recognised to be wrong in law, given that an application for a stay of execution pending an appeal can be heard by the court below; counsel asked orally for permission to file a further affidavit of the claimant, exhibiting the grounds of appeal. Unsurprisingly, Mr Daley objected to this course.

15. I refused the application. Barnaby J's judgment was delivered on May 23, 2023, over one year and 3 months before the filing of the notice of application. On the applicant's evidence, his appeal was filed on July 5, 2023, nearly seven months before the filing of the notice of application. He ought to have recognised when he filed his application, that he should have put before the court the basis on which he contends that his appeal against the judgment of Barnaby J is arguable and has some prospect of success. His grounds of appeal were available to him at that time. I refused to countenance such a request, made obviously as a last resort when all else failed, and clearly prejudicial to the defendants, as they would be entitled to respond to such evidence, which would necessitate an adjournment of the hearing. In his written submissions, Mr Brown suggests that "a purely technical procedural breach" by the claimant's attorney-at-law, ought not to deprive the claimant of the ability to have his case decided on the merits. The difficulty however

with this submission is that the lack of evidence to support the application can hardly be described as a “technical procedural breach”.

16. Notwithstanding the absence of any evidence of the merits of the appeal, my assessment of the claimant’s affidavit is that he has not presented any credible evidence of his impecuniosity or inability to pay the costs. As observed by Mr Daley, he has not exhibited, for example, any bank statements or financial statement of his income and liabilities to support his bald assertion that he is unable to pay the costs. The claimant says, for example, that he collects rent monthly from two tenants (which is now in jeopardy since Barnaby J’s judgment), but does not say how much he earns from that source of income. Curiously, he says he does not know what his legal fees will be, yet he claims to be unable to pay them and prosecute his appeal. On this evidence I am certainly not satisfied that he will face financial ruin because of taxation, or that he would not be able to pursue his appeal.

17. In the final analysis, the state of the evidence makes it impossible for me to determine whether the claimant’s appeal has any merit and does not satisfy me that the risk of injustice to him would be greater, were the stay refused, than it would be to the defendant, should it be granted. The application to stay taxation must therefore be refused as it would not be in the interest of justice to grant it.

Extension of time to file Points of Dispute

18. CPR 65.20(3) provides that points of dispute are to be filed by the paying party within 28 days of being served with a bill of costs. The claimant has provided no evidence indicating why he was unable to file points of dispute within the 28-day period stipulated by CPR 65.20(3), and he has in fact not filed any. Under CPR 65(20)(4), where a party fails to file points of dispute within this 28-day period, he cannot be heard at the taxation unless the registrar gives permission. CPR65(20)(6) provides that where points of dispute are filed before a default cost certificate is issued, the registrar may not issue the default cost certificate. CPR

65(21)(2) however states that where the receiving party is permitted to obtain a default cost certificate, the registrar must sign the certificate. In this case, the claimant has not filed points of dispute. He merely states in his affidavit that the costs are unreasonable, they are not proportionate to the money value of the claim, the claim was tried quickly, and the matter was not complex. This is the extent of his evidence.

19. In **Re Diana Thornburn, Rachel Hernould and Barbara Thornburn - McIntosh and Ernest Carrol Thornburn** [**2023] JMSC Civ 233,** a decision relied on by Mr Daley, Master K. Anderson in an application before her for an extension of time to file points of dispute, determined that under the scheme of CPR 65, such applications are not permissible without filed points of dispute. At paragraph 46 of her decision, the learned Master said this: -

> "This Court also holds the view that Rule 26.1(2)(c), which grants the Court powers of case management to "extend or shorten the time for compliance with any rule, practice direction, order or direction of the Court even if the application for an extension is made after the time for compliance has passed" constitutes a general provision which is not applicable to the specific rules of the Costs Regime in Part 65. These specific rules do not make provision for Applications for Extensions of Time to be made in cases where no Points of Dispute have been filed. I do not perceive this however as a lacuna in the rules as submitted by Counsel for the Applicants, but rather a clear expression of the rule framers' intent that the paying party should not be granted a hearing in the taxation process unless a Points of Dispute has been filed".

I accept and endorse this dictum.

20. Points of dispute contain the paying party's objections to the receiving party's costs. They indicate, the nature and grounds of dispute. It seems to me, that the rationale for requiring points of dispute to be filed, albeit out of time, when an application for an extension of time is made, is to ensure that the paying party genuinely has objections to the receiving party's costs and is not merely seeking to delay and disrupt the taxation proceedings, as a stratagem. In the absence of filed points of dispute, the claimant's application for an extension of time must therefore be refused. Any default cost certificate filed by the defendants ought therefore to be signed by the registrar.

Extension of time to file Bill of Costs

21. The claimant also seeks an extension of time to file his bill of costs in relation to the summary judgment application made by the defendants and which was determined in his favour.

22. CPR 65.18(1) states that taxation proceedings are commenced by the receiving party, and CPR 65.18 (2) provides that a bill of costs "must" be filed and served not more than three months after the date of the order or event entitling the receiving party to costs. By virtue of CPR 65.19(1) however, where a receiving party does not commence taxation within the time set out in CPR 65.18(2), the paying party may apply for an order requiring the receiving party to commence taxation proceedings within such time specified by the registrar. There is no provision in CPR 65, entitling a receiving party to apply for an extension of time to file a bill of costs. The Court of Appeal in **Auburn Court Limited and Another v National Commercial Bank Jamaica Limited and Another SCCA No 27 of 2004, Application 7 of 2009, delivered March 18, 2009** [2]**,** held however that there

[2] See too the decision in **Jasper Bernard v Radio Jamaica Limited and Ors , Claim No 2006 HCV02180, unreported Supreme Court decision delivered June 13, 2011**.

is no obligation on a receiving party to file a bill of costs within the stated period in CPR 65.18(2). At paragraphs 14 and 15 of that judgment this is what Harris JA said: -

> "14. Under Rule 65.19(2), the registrar, on an application from the paying party, is permitted to disallow all or part of the costs if the receiving party fails to commence taxation within the time specified by the registrar. Where there is a period of delay in the filing of the bill of costs, Rule 65.19(3) confers on the court an inherent power to disallow all or a portion of the statutory interest accruing on the costs. The court may also disallow all or part of the costs of taxation.
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> 15. It appears to me that, the drafters of the Rules, in conferring discretionary powers on the registrar and the court to make certain orders on a receiving party's failure to commence taxation within the prescribed time, must have intended that the word "must" is not mandatory. It would have been contemplated by them that the word ought to be construed as meaning "may". It follows that the word "must" within the context of Rule 65.18(2) is merely directory and therefore does not impose upon a receiving party any obligation to adhere strictly to the filing of a bill of costs within the requisite period".

23. With no obligation on the claimant to file his bill of costs within the time specified in CPR 65.18(2), and no provision in CPR 65 entitling him to make an application for an extension of time within which to do so, the aspect of his application for an extension of time to file a bill of costs in respect to the summary judgment application must be dismissed.

Summary of findings

24. I find that in the absence of any evidence of the merits of the appeal and, given the unsatisfactory evidence in relation to the claimant's alleged impecuniosity, it is not in interest of justice to grant a stay of the taxation proceedings.

25. I find that the application for an extension of time to file points of dispute may only be made where points of dispute have been filed. Up to the time of the hearing of this application, none has been filed by the claimant. I should also add that there is in any event no evidence from the claimant explaining why he was unable to file points of dispute within the 28-day period stipulated by CPR 65.20(3).

26. In relation to the order seeking an extension of time to file a bill of costs in respect of the summary judgment application determined in the claimant's favour, on the authority of **Auburn Court Limited and Another v National Commercial Bank Jamaica Limited and Another** (supra), there is no obligation on the claimant to file his bill of costs within the three-month period provided for in CPR 65.18(2). There is also no provision under CPR 65, permitting a paying party to make such an application.

Conclusion

27. Having regard to the foregoing, I make the following orders: -

a) The application is dismissed.

b) Costs to the defendants to be agreed or taxed

A Jarrett
Puisne Judge