

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 133/2007

MOTION NO. 4/2010

BEFORE: THE HON. MR JUSTICE PANTON, P.
THE HON. MRS JUSTICE HARRIS, J.A
THE HON. MISS JUSTICE PHILLIPS, J.A.

BETWEEN THE COMMISSIONER OF TAXPAYER
AUDIT AND ASSESSMENT APPLICANT

AND CIGARETTE COMPANY OF
JAMAICA LTD
(In Voluntary Liquidation) RESPONDENT

Curtis Cochrane & Mrs Michelle Shand-Forbes, instructed by the Director of
State Proceedings for the applicant

Vincent Nelson, Q.C., & Ms. Tamara Robinson, instructed by Myers,
Fletcher & Gordon for the respondent

26 and 29 April 2010

ORAL JUDGMENT

PANTON, P.

[1] On 26 April 2010 Mr Curtis Cochrane, counsel for the applicant
Commissioner of Taxpayer Audit and Assessment, applied to this Court for
the grant of conditional leave to appeal to Her Majesty in Council in

respect of a judgment delivered on 12 February 2010. The applicant also sought a stay of execution of the judgment pending the determination of the appeal by the Judicial Committee of the Privy Council.

[2] The order against which the applicant seeks to appeal reads:

"Appeal against the assessments allowed. Judgment of Anderson, J in respect of the assessments set aside. Judgment entered in favour of the appellant. Costs in this Court and the court below to be the appellant's; such costs to be taxed if not agreed. Liberty to apply."

[3] So far as the application for conditional leave is concerned, there can be no objection, and indeed there is none, as the decision of this Court in the matter is a final decision in civil proceedings. Section 110(1) of the Constitution of Jamaica gives an appeal as of right in a situation such as this.

[4] The order is accordingly made granting leave to appeal upon condition of the appellant, within 90 days from the date hereof, entering into security in the sum of \$1,000.00 for the due prosecution of the appeal and the payment of all such costs as may become payable by the applicant in the event of his not obtaining an order granting final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee ordering the appellant to pay costs of the appeal; and within the said 90 days taking the necessary steps for the purposes of

procuring the preparation of the record and the dispatch thereof to England.

[5] The application for a stay of execution of the judgment claims support from two affidavits by Miss Tora Hamilton, one filed on 2 March 2010 and the other on 22 April 2010. In the first affidavit, she states at paragraph 7:

“The position as to the nature of the transfers from the Cigarette Company of Jamaica Limited to Carreras between 1997 and 2002 needs to be adjudicated on. There needs to be clear guidelines as to how such transfers should be classified.”

Apart from that statement, there was nothing said in respect of the merits or demerits of the judgment, or the prospects of success of any appeal. Nor was there any good reason advanced by the applicant as to why the successful respondent should be deprived of the fruits of its victory in the suit.

[6] The second affidavit was filed on the day after one was filed by Mr Michael Bernard, managing director of Carreras Limited the parent company of the respondent in this application. Miss Hamilton describes her second affidavit as supplemental to the first. She states in paragraph 5 that the matter “involves a very substantial sum of money and novel, difficult and important issues of law”. That the sum of money is substantial is an undisputed fact. However, the “novel, difficult and important issues

of law" have not been identified and specified. Paragraph 6 of the affidavit reads simply:

"Given the issues involved the Respondent has a real prospect of success."

There has been no attempt to demonstrate this reality. Paragraph 7 of the affidavit gives what appears to be the real thinking behind the application. It states:

"... I am informed and do verily believe [the sum] is unaffordable at this time and is not in the public interest."

Finally, paragraph 8 states that the respondent is in liquidation and so the applicant fears that if there is no stay of execution of the judgment, a successful appeal may be rendered nugatory.

[7] In considering the application for a stay of execution rule 6 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 is the governing rule. It reads:

"Where the judgment appealed from requires the appellant to pay money or do any act, the Court shall have power, when granting leave to appeal, either to direct that the said judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just, and in case the Court shall direct the said judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such Order as Her Majesty in Council shall think fit to make thereon."

[8] This rule, or its equivalent, has been the subject of much judicial attention and interpretation over the years. It is perhaps necessary to refer to a few such instances. In ***Jamaica Flour Mills Limited v West Indies Alliance Insurance Company Limited and Another*** (1997) 34 JLR 244 at page 250 paragraphs A-C Downer J.A. said:

"So, in construing this rule, each case must be considered against the background of its own circumstances and one circumstance is that the appellant has good arguable grounds of appeal. This principle is applicable both to appeals from the Supreme Court to the Court of Appeal and from the Court of Appeal to the Privy Council.

The modern approach as reflected in rules of procedure generally therefore is to balance the right to enforce a judgment at the first or second tier against the prospects of success of the appellant if there is a good arguable appeal. This approach was followed by ***Linotype-Hell Finance Ltd v Baker*** [1992] 4 All ER 887 by Staughton LJ in appeals to the Court of Appeal. This Court has frequently followed that course and imposed appropriate terms."

The learned judge Downer J.A. then made reference to two cases which he said illustrate the approach in applying the same principle in respect of appeals to the House of Lords. Those cases are ***Wilson v Church*** (No. 2) [1879] 12 Ch 454 at 458 and ***Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd*** Vol. L 1933-1934, 581.

[9] The headnote of the ***Linotype*** case reads:

"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 old rule that a stay of execution would only be granted where the appellant satisfied the court that if the damages and costs were paid there would be no reasonable prospect of recovering them if the appeal succeeded is now far too stringent a test and does not reflect the court's current practice."

Staughton LJ sitting in the English Court of Appeal said at page 888:

"... there are a large number of nineteenth century cases cited as to when there should be a stay of execution pending an appeal. At a brief glance they do not seem to me to reflect the current practice in this Court; and I would have thought it was much to be desired that all the nineteenth century cases should be put on one side and that one should concentrate on the current practice. It seems to me that, if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution."

[10] In looking at the instant application, it cannot seriously be said that the applicant would be ruined by refunding the sum collected from the respondent. It must be borne in mind that the applicant here is virtually the State. Furthermore, this is not a payment that is required of the applicant; rather, it is a refunding. In any event, no acceptable arguments have been put forward to show any real prospect of success.

[11] It seems that this is a matter that requires negotiation between the parties. From a legal point of view, it is our opinion that the applicant has no leg on which to stand in respect of the application for a stay of execution. We note the contents of the affidavit of the managing director of Carreras Limited. It speaks of the need for the respondent's shareholders to receive what is due to them. We note also the statement in paragraph 9 of the affidavit which indicates that Carreras Limited "has the financial resources to repay any monies which may be payable to the respondent consequent upon a judgment of the Privy Council in its favour" and we note also its ability to provide good and sufficient security on behalf of the respondent as may be ordered by the court.

[12] Given the particular features of this case in respect of the liquidation, we are minded to make an order in respect of security as contemplated in rule 6 quoted above.

[13] The order therefore is that the application for a stay of execution is refused. Carreras Limited, on behalf of the respondent herein, Cigarette Company of Jamaica Limited (in voluntary liquidation), is to give an undertaking to repay any monies refunded to Cigarette Company of Jamaica Limited (in voluntary liquidation) in the event that the appeal to the Privy Council is successful.