J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 29/75

BEFORE: The Hon. Mr. Justice Robinson, President
The Hon. Mr. Justice Graham Perkins, J.A.
The Hon. Mr. Justice Swaby, J.A.

The Gleaner Co. Ltd. v. Charles W. Wright

Mr. N. Hill, Q.C. and Miss Francis
for the Defendant/Appellant

Mr. N. McCaulay, Q.C. and Mr. K.C. Burke
for the Plaintiff/Respondent

4th, 5th November, 1976

PRESIDENT,

In this case it does not appear to us that the learned Judge had any sufficient material on which to exercise his discretion in favour of granting a stay of execution.

The authorities clearly establish that no stay of execution should be granted unless evidence is adduced to show that the respondent to the appeal will be unable to repay the amount of the judgment if the appellant be successful in the appeal. See, for example, the case of Barker v. Lavery (1885) 14 Q.B.D. 769. The only material before the Judge in support of the application for a stay of execution was contained in an Affidavit of Richard Gordon Ashenheim sworn to on the 23rd April, 1976, in which he alleged that "if the Defendant/Appellant is required to pay the amount of the judgment now and is later successful in its appeal there is likely to be real hardship on the Defendant/Appellant since it is improbable that the Defendant/Appellant will be able to obtain from the Plaintiff/Respondent any refund of the amount of the judgment and costs." No evidence was adduced in support of that

allegation .....

allegation. And while it is provided by S. 408 of the Judicature (Civil Procedure Code) Law, Cap. 177 of the 1953 Revised Laws of Jamaica, that in interlocutory proceedings an affidavit may contain statements of information and belief, it is a condition that the sources and grounds thereof must also be set out therein.

We share the view expressed by Lord Selbourne, L.C. in Bidder v. Bridges, 26 Ch. D. 1 at p. 8 where he said, with reference to Order 38, rule 3, the English equivalent to our S. 408 as follows:

> " I do not think this Court can for a single moment give countenance to the notion that any common neglect, if there be such common neglect, of the provisions of that Order can absolve persons from the consequences of disregarding them when the question is raised, as it is here raised, by a person having a right to raise it. That Order requires, in effect, that affidavit evidence as to matters of fact by a person who is not able strictly to prove them, must shew, not only the fact **but also the grounds** of his belief."

In that case Lord Selborne was dealing with an affidavit which contained the bald allegation that a certain number of witnesses were over seventy years of age. This affidavit had been filed in support of an application for an order for the examination of these witnesses de bene esse. At page 10 Lord Eldon proceeded to speak as follows:

> " A gentleman of whom I desire to speak with all possible respect, and who I have no doubt intended to do his duty in the most upright way, but yet who gives the Court no reason to believe that he has any personal knowledge whatever of the ages of any of these witnesses, makes an affidavit in the form of a positive statement that they are all above seventy. Now would that be any prima facie evidence whatever, even for the purposes of an interlocutory "order .....

" order, of that fact, as to any one of them, in any other case? I think not. It appears to me that the Court ought to know specifically what information as to the age of each of those persons he has received and what means have been taken to inquire in the best quarters upon that subject, and on what his belief is founded."

Mutatis mutandis, the same observations apply to the Affidavit of Mr. Ashenheim.

In the circumstances the Order made by Watkins, J.A. on the 4th of May, 1976, is discharged and it is hereby ordered that the applicant herein should have the costs of this application and also the costs of the application before Watkins, J.A.

Certificate for counsel before Watkins, J.A.