[2012] JMCA App 34

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 138/2012

APPLICATION NOS 233 & 246/2012

BETWEEN	**PETER HARGITAY**	**APPLICANT**
AND	**RICCO GARTMANN**	**RESPONDENT**

Ransford Braham QC and Ian Wilkinson instructed by Wilkinson and Company for the applicant

Stephen Shelton and Ms Maliaca Wong instructed by Myers Fletcher and Gordon for the respondent

4, 10 and 18 December 2012

IN CHAMBERS

BROOKS JA

[1] On 23 June 2008, the Supreme Court of Judicature of Jamaica entered judgment in favour of Mr Ricco Gartmann against Mr Peter Hargitay. The judgment was in default of defence and was in the total sum of 3,066,487.23 Swiss Francs. Court costs and interest were also awarded to Mr Gartmann.

[2] Neither man resided in Jamaica when the claim was filed on 31 January 2002. They are, apparently, both Swiss nationals. Mr Hargitay complains, in that context, that there was no basis for filing the claim in this jurisdiction as the contract which gave rise

to the alleged debt was made outside of Jamaica. Mr Hargitay also contends that the judgment was entered in breach of rule 12.5(e) of the Civil Procedure Rules (CPR), because at that time, he had pending, an application for extension of time to file his defence out of time. Like other aspects of the instant case, however, the status of the application was not without complication and some uncertainty.

[3] Mr Hargitay applied to have the default judgement set aside. His application was heard by Daye J who, on 26 October 2012, refused the application to set aside the judgment, but ordered that it should be varied. The variation allowed for the principal sum of the judgment to be varied and for the interest thereon to be assessed by the court. There is, as yet, no formal order in respect of Daye J's decision, but Mr Hargitay has appealed against it. Before me, he has applied for a stay of execution pending appeal. He has filed two separate notices seeking the same relief. He asserts that he has an arguable appeal and that in the interests of justice a stay should be granted.

[4] Mr Gartmann strenuously resists the application. He asserts that Daye J correctly refused Mr Hargitay's application. This is because Mr Hargitay's proposed defence has no real prospect of success. On the question of the application for the extension of time, Mr Shelton, on behalf of Mr Gartmann submitted that that application had been dismissed in the Supreme Court and had not been revived or renewed. In the circumstances, the judgment had been properly entered and Mr Hargitay's contention to the contrary is flawed.

[5] The issue of the existence of an application for extension of time is one of the major issues that will be assessed on appeal. The other main issue is the substance of the defence, being that the debt, on which Mr Gartmann had based his claim, was barred by the operation of the Limitation of Actions Act. I am cognizant that this is not the appeal and that I need only take an overview of the arguments on either side in the context of the principles governing an application for a stay of execution.

The principles governing an application for stay of execution

[6] Rule 2.11(1)(b) authorises a single judge of this court to make orders for the stay of execution, pending appeal, of any judgment which is the subject of an appeal. The grant of a stay of execution is, however, a discretionary order. Guidance as to the exercise of that discretion has shifted over the years. It has moved from the strict position adumbrated in **Atkins v Great Western Railway** (1886) 2 TLR 400 through the modifed position set out in **Linotype-Hell Finance v Baker** [1992] 4 All ER 887, to the current position advocated for in the unreported decisions of **Combi (Singapore) PTE Limited v Ramnath Sriram** (delivered 23 July 1997) and **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065.

[7] The principle stated in **Combi (Singapore) PTE Limited v Ramnath Sriram** and **Hammond Suddard** speaks to the justice of the case after examining all the circumstances. In **Combi (Singapore) PTE Limited v Ramnath Sriram**, Phillips LJ stressed the aspect of irremediable harm. He stated at page 5 of his judgment:

> "**In my judgment the proper approach must be to make that order which best accords with the interest of justice**. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. **This assumes of course that the court concludes that there may be some merit in the appeal.** If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice. The starting point must be that the normal rule as indicated by Order 59, rule 13 is that there is no stay but, where the justice of that approach is in doubt, the answer may well depend upon the perceived strength of the appeal." (Emphasis supplied)

[8] Clarke LJ in **Hammond Suddard** did not speak of the need to identify irremediable harm. The principle that he recommended is concisely set out at paragraph 22 of his judgment. There, the learned Law Lord stated:

> "Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is **whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay**. 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 unable 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?" (Emphasis supplied)

[9] This court has approved the stance taken in the **Hammond Suddard** case (see **Kingsley Thomas v Collin Innis** SCCA No 99/2005, Application No 162/2005 (delivered 14 February 2006) and **Cable and Wireless Jamaica Limited (T/A Lime) v Digicel (Jamaica) Limited** SCCA No 148/2009 Application No 196/2009 (delivered 16 December 2009)). The starting point of analysis is still, however, whether there is some merit in the appeal or, put another way, whether the appeal has a real prospect of success.

The analysis

[10] Having stated those principles, the first issue to be considered is whether the appeal in the instant case has some merit. In this regard, I shall briefly consider the two issues identified above, namely, whether the judgment in default was properly entered and secondly, whether the limitation point has merit.

(a) The entry of the default judgment

[11] An outline of the background to the issue of the entry of the judgment in default of defence, starts with the claim, which was filed on 31 January 2002. In response to the claim, Mr Hargitay filed a number of applications for court orders. Only one is relevant for the present purposes. It is an amended application for court orders filed on 3 February 2005. It sought an order that the claim was statute barred. In the alternative, it sought an extension of time within which to file a statement of defence.

[12] The application came on before Harris J (as she then was) and on 25 October 2005, the learned judge agreed that the claim was, indeed, statute-barred. She

accordingly struck it out. Harris J also dismissed the application for extension of time to file the defence. Significantly, these orders were set out as discrete parts of the order culminating Harris J's written judgment on the application, and of the resultant formal order.

[13] On an appeal from Mr Gartmann, this court, on 15 March 2007 ordered as follows:

> "The appeal is allowed. The order made by the court below is set aside. Costs to the appellant to be agreed or taxed both here and in the court below."

[14] Mr Braham QC, on behalf of Mr Hargitay, submitted that the order of this court, framed as it was, meant that the status of the application for extension of time to file the defence, that went before Harris J, was restored. Mr Shelton countered that, as there was no counter-appeal and no ruling by this court in respect of that application, the dismissal by Harris J remained in force. Mr Shelton pointed out that, at paragraph 5 of his judgment in this court, Cooke JA stated:

> "There is no appeal against the second order regarding the extension of time to file [sic] defence. The appeal before this court is as to the order that the appellant's claim is statute barred. This court is only concerned with this issue."

[15] As presently advised, it would seem to me, as a prelimanary position, that Mr Braham's submission on this point is flawed. In my view, where this court makes an order reversing the decision of the court below, unless the order further specifies that the application in question is to be re-heard or is otherwise restored, the judgment of this court finalises that application. Support for that position is drawn from the

judgment of Barwick CJ in **Bailey v Marinoff** [1971] HCA 49; (1971) 125 CLR 529 at page 530:

> "Once an order disposing of a proceeding has been perfected by being drawn up as the record of the court, that proceeding apart from any specific and relevant statutory provision is at an end in that court and is in its substance, in my opinion, beyond recall by that court. It would, in my opinion, not promote the due administration of the law or the promotion of justice for a court to have a power to reinstate a proceeding of which it has finally disposed."

That quotation was cited, with approval, by Giles JA at paragraph 26 of his judgment in **Meehan and Others v Glazier Holdings Pty Ltd** [2002] NSWCA 22 (delivered 7 March 2002).

[16] The result of my preliminary view is that there would have been, in place, no application to extend time, when the default judgment was entered on 23 June 2008. Harris J's dismissal of the application to extend time would have remained undisturbed. The entry of the judgment in default of defence would, therefore, not have breached rule 12.5(e) of the CPR. It would have been regularly and properly entered.

[17] I stress that that is a preliminary view and whereas I make no definitive decision on the matter, that issue alone would not convince me that there is an arguable appeal.

(b) <u>The limitation point</u>

[18] There is no serious dispute that when the claim had been filed, no payment against the alleged debt had been made for over six years. The essence of the dispute, concerning the operation of the provisions of the Limitation of Actions Act, is whether

there had been an acknowledgment of the debt within six years prior to the filing of the claim. The document upon which this issue turns is a letter from Mr Hargitay dated 10 June 1999. The letter was exhibited to an affidavit filed by Mr Gartmann on 18 June 2004. Mr Gartmann asserts that the letter is an acknowledgment of the debt while Mr Hargitay argues that it is not.

[19] Although Mr Hargitay has raised points about whether there are any pleadings of an acknowledgment, so as to save the claim from doom, it seems to me that that issue was raised in, and disposed of, by this court in the previous appeal. All the judges who heard the appeal ruled that the letter of 10 June 1999 ought to have been considered by Harris J. All of them made the point that Mr Hargitay had not denied the contents of the letter or stated that the translation from the German language to English was inaccurate. One of the translations of the letter reads:

> "Dear Ricco,
>
> 1,1,64,000 Fr were owing to you as at 31/12/1991. This amount was, at that time, used for only one purpose – the buyback of shares in the Hargitay Group Holding Inc, Zug by the BBC subsidiary IPT Inc, Baden.
>
> I repaid 509,125.95 Fr in total between 31/12/1991 and 21/07/1994 according to information from your accounting department. As at 21/07/1994, a capital balance of 654,874.05 Fr ought to have been entered in the books.
>
> Despite my abovementioned payments, 1,540,693.80 Sfr were accrued in interest between the period 31/12/1991 and 30/06/1999 which according to the figure worked out by your accounting department brings the present balance to 2,049,819.75 Fr.

In short, this means that the actual capital debt is 654,874.05 Fr and the accrued interest which you calculated at 10% per annum amounts to 1,540,693.80 Fr.

This corresponds to a cumulative interest increase of 235% for the abovementioned 7.5 year time period or, in other words, an annual average interest rate of 31.33%.

For reasons known thoroughly to you, it was not possible for me to make further payments in the matter above between 1995 and 1999.

Things have gone back to normal since the start of 1999 and so I will have funds at my disposal shortly.

I hereby confirm that I will continue repayments at the earliest possible juncture.

As far as the interest on the capital and the compound interest are concerned, you told me that 'something will work itself out.' I hereby ask you formally,

a. As of today, to freeze the interest (an interest moratorium), and

b. To cancel the accrued interest at least partially after the commencement of an incremental repayment of the capital insofar as you consider this feasible.

I thank you sincerely for your continued support." (Emphasis supplied)

(c) Other liability issues

[20] Mr Braham raised other issues on behalf of Mr Hargitay. They included the question of whether compound interest had been included in the judgment sum and whether payments made and objects of art sold, by Mr Hargitay to Mr Gartmann had been accounted for. Learned Queen's Counsel argued that these matters required

adjudication. Mr Braham also submitted that the order made by Daye J is subject to uncertainty as there is no figure that has been identified as the principal sum.

[21] Again, as presently advised, I am not convinced that Mr Hargitay will be able to satisfy this court on appeal, that Daye J was wrong in refusing to set aside the judgment. The emphasised portion of the letter quoted above seems to be an acknowledgment of a capital figure, and as mentioned above, the contents of the letter have not been denied.

[22] In my view, there is no real prospect of success on appeal.

[23] In the event that I am wrong on that issue, I would also state that Mr Hargitay has not placed any information before me that convinces me that payment of the principal sum would stifle the appeal or cause him irremediable harm. He has said at paragraph 19 of his affidavit filed on 26 November 2012:

> "That I will be bankrupt and ruined if the said Default Judgment is executed, locally or abroad, before my appeal is heard. I will be severely prejudiced and suffer great embarrassment and loss if the said Default Judgment is executed as news of this will spread in the United Kingdom, Switzerland and other places where I do business from time to time.

Mr Hargitay made a similar statement at paragraph 19 of his affidavit filed on 13 November 2012.

[24] Those statements are designed to meet the principle set out in **Linotype-Hell Finance v Baker**, where the principle addressing irremediable harm, required a statement that without a stay of execution the applicant would be ruined. Although the

actual statement is no longer considered a mandatory requirement, Mr Hargitay has made the statement in his affidavits. He has, however, not provided any information to support his assertions. It is not enough to make the statements, without more.

[25] An applicant must demonstrate that the position he asserts, exists in reality. That point was also made in the **Hammond Suddard** case. At paragraph 13 of his judgment Clarke LJ stated in respect of the issue of the applicant's financial position that "the evidence in support of an application for a stay needs to be full, frank and clear". At paragraph 20 he emphasised the point:

> "Before it could properly grant a stay, the court needs to have a full understanding of the true state of the company's affairs. Simple assertion, particularly if it is scarcely consistent with previous assertions, is not enough."

That statement would equally apply to any other applicant, corporate or individual. It would have even greater effect where the applicant is not based in this jurisdiction as there would be no readily available means to ascertain the veracity of the statements as to financial status. Such applicants, as Clarke LJ stated, at paragraph 19 of his judgment, "must produce cogent evidence that there is a real risk of injustice if enforcement is allowed to take place pending appeal".

[26] The evidence is that Mr Hargitay sold real estate in Jamaica in 2005. The sale price was US$900,000.00. Against that evidence, Mr Hargitay has not said why he cannot pay the sum of 654,874.05 Swiss Francs, which seems to be the figure that has, allegedly, been acknowledged by him as being the capital sum owed. In respect of the

appeal, Mr Hargitay has not said that his appeal would be stifled if he were to pay the sum.

[27] On the other side of the equation, Mr Gartmann has a judgment which has been outstanding since 2008. Further delay will not render it any easier for him to collect the judgment debt. Secondly, Mr Hargitay acknowledges that Mr Gartmann is a man of means. There is no allegation that were the appeal to be successful and the defence proved to be eventually successful, Mr Hargitay would not be able to recover the money from Mr Gartmann, if it were paid to him.

[28] In applying the principles set out in the **Hammond Suddard** case I find that there would be a greater risk of injustice to Mr Gartmann if the stay were granted than to Mr Hargitay if the stay were refused. Accordingly, the application for the stay is refused.

Order

[29] (1) The applications filed herein on 13 and 26 November 2012 respectively, for stay of execution of the judgment or order of Daye J, pending the hearing of the appeal therefrom, are refused.

(2) Costs to the respondent to be taxed if not agreed.