JMCC. Comm. 35

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU2020CD00095

BETWEEN	**HASHEBA DEVELOPMENT COMPANY LIMITED**	**CLAIMANT /RESONDENT**
AND	**PETROLEUM CORPORATION OF JAMAICA LIMITED**	**1ST DEFENDANT /APPLICANT**
AND	**SEAN KINGHORN**	**2ND DEFENDANT**
AND	**JUDY ANN KINGHORN**	**3RD DEFENDANT**
AND	**KINGHORN & KINGHORN (A PARTNERSHIP LAW FIRM)**	**4TH DEFENDANT**

IN OPEN COURT

Mr Abraham Dabdoub and Mr Christopher Dunkley instructed by Dabdoub Dabdoub & Co., Attorneys-at-Law for the Claimant

Mr Michael Hylton QC, Mr Garth McBean QC, Ms Dian Johnson and Mr Mike A. Hylton instructed by Garth McBean & Co., Attorneys-at-Law for the 1st Defendant/Applicant

Heard: 3rd and 14th December 2020.

Civil Procedure - Whether the Supreme Court has jurisdiction to hear an application to discharge a freezing order made by a Judge of the court after there was a judgment on the claim and before there was an appeal against that judgment and a stay of execution of portions thereof

***Ex-parte* freezing orders - whether the Supreme Court retains the jurisdiction to address *ex parte* orders even if there is an appeal in respect of the judgment in the claim, in aid of which a protective freezing order was granted**

LAING, J

Ruling on preliminary objection

The Application

[1] The 1st Defendant, Petroleum Company of Jamaica Limited, by a Notice of Application filed on 13th November 2020 ("the Application") seeks the following orders:

> *1. An order pursuant to Rule 11. 16 (1) of the Civil Procedure Rules ("the CPR") that paragraph 3 of the order that was made on October 5, 2020 by the Honourable Mr. Justice Batts be discharged.*
>
> *2. An order that the Claimant pay the costs of this application and order.*
>
> *3. Such further and other relief as this Honourable Court deems fit.*

The background

[2] The Claimant is a limited liability company duly incorporated under the laws of Jamaica, and is engaged in the development of land in the parish of Clarendon which is owned by the Claimant ("the Development").

[3] The 1st Defendant is a limited liability company engaged in the petroleum industry.

[4] Arising from a dispute between the parties related to three agreements for the purchase of certain lands in the parish of Clarendon, a claim was filed on 27th February 2020. The claim was heard by Laing J who delivered a judgment on 27th July 2020 ordering specific performance of the agreements and various other orders.

[5] On 28th September 2020, the Claimant filed a without notice application pursuant to which on 5th October 2020, it obtained an *ex parte* order which restrained the 1st

Defendant from transferring, assigning, charging or otherwise dealing with its assets to the extent of $513,000,000.00.

[6] On 3rd November 2020 the Court of Appeal granted the 1st Defendant leave to appeal against the decision of Laing J, and also granted a stay of execution of paragraphs 2, 3, 4, 5 and 6 of the orders of Laing J, until the hearing of the appeal.

The jurisdictional point

The Claimant's submissions

[7] The Claimant contends that a Judge of the Supreme Court is not entitled to hear an application made in a claim which has been appealed and in respect of which a stay of execution has been granted. It contends that the Supreme Court lacks the jurisdiction to consider this or any application where the substantive matter is pending appeal and is therefore under the jurisdiction of the Court of Appeal.

[8] The Claimant relies on the Court of Appeal's orders in **Paul Chen Young and Others v The Eagle Merchant Bank of Jamaica Limited and Others** Civil Appeal Number 39 of 2006, Application No. 137/07. In that case the Honourable Mr. Justice Roy Anderson on the 15th June 2006 heard an application filed by the Defendants for a stay of execution of a judgment dated 4th May 2006, pending the hearing of the appeal filed by the Defendants. The Claimants thereafter filed an application to set aside the order of Justice Anderson. That application was heard on the 11th May 2007 before the Honourable Mr. Justice Andrew Rattray who granted an order revoking the order of Justice Anderson made on 15th June 2006. The Defendants filed a Re-issued Notice of Application in the Court of Appeal seeking a declaration that this order of Justice Rattray was a nullity or alternatively of no legal effect.

[9] On 2nd November 2010, the Court of Appeal heard the Application and made the following orders:

> *1. Order granted in terms of Paragraphs 1 (a) and (b) of the "Re-Issued" Notice of Application for Court Orders dated the 20th day of September, 2007 to wit:-*
>
> > *1. "A Declaration that the Order dated the 11th day of May 2007 granted by the Honourable Mr. Justice Rattray in the Supreme Court in Claim Number C. L 1998/E-095, revoking the earlier Order made by Mr. Justice Anderson on the 15th day of June, 2006 is a nullity or, alternatively, of no legal effect as:-*
> >
> > > *(a) Mr. Justice Rattray had no jurisdiction to consider the application or make the said Order as the substantive matter was pending appeal and under the jurisdiction of this Honourable Court.*
> > >
> > > *(b) Mr. Justice Rattray, being the Judge of concurrent or co-ordinate jurisdiction, had no jurisdiction to act as a Court of Appeal in revoking Mr. Justice Andersons said order."*
>
> *2. The Applicants to have costs in the application, to be agreed or taxed.*

[10] On the strength of these orders, Mr. Dabdoub submitted that once a matter has been appealed, and a stay of execution granted, whether in the Supreme Court or in the Court of Appeal, there can be no further applications or orders made in the Supreme Court.

[11] Mr. Dabdoub further submitted, that once there is a pending appeal, the Court of Appeal is seized with jurisdiction to hear all applications and make orders in matters incidental to the hearing of the appeal. In support of this position, Mr. Dabdoub relied on the case of **Phyllis Mitchell v Abraham Dabdoub and Others** Court of Appeal, Supreme Court Civil, Appeal number 95/2001. Counsel relied in particular on the judgment of Forte, P at page 3 of the judgment where he stated as follows:

> *The power, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations 1958 in so far as is relevant to this issue is to be found in Section 8 (2):*
>
> > *"For the purposes of this section, there shall be vested in the Court of Appeal all jurisdiction and powers formally vested in the Supreme Court, or Full Court, when exercising appellate jurisdiction, and for all the purposes of and incidental to the hearing and determination of any appeal*

> *and the amendment, execution and enforcement of any judgment or order made thereon the Court of Appeal shall have all the power, authority and jurisdiction of the Supreme Court or Full Court."*

> *This section in my view makes it very clear that the Court of Appeal has the jurisdiction to hear matters which are incidental to the hearing of an appeal. In my judgment, the question whether the mere filing of an appeal amounts to an automatic stay, particularly given the history and circumstances of this case, is a question of law incidental to the hearing of the appeal. Section 10 of the Judicature (Appellate Jurisdiction) Act speaks to such matters and I would therefore conclude that by virtue of that section this Court has the jurisdiction to hear the Motion.*

[12] Mr. Dabdoub submitted, that on the strength of these cases, it is therefore patently clear, that an application to set aside the freezing order in this case is incidental to the hearing of the appeal and therefore should have been made to the Court of appeal. Accordingly, the Application before the Court is being made in the wrong forum.

The 1st Defendant's submissions

[13] Mr. Michael Hyton QC submitted that because Justice Batts' orders were made without notice to the 1st Defendant, not only does the same Judge or another Judge of the Supreme Court have jurisdiction to vary or set it aside, but the Court of Appeal would probably decline to hear an appeal or an application to do so.

[14] In support of these submissions, Mr. Hylton relied heavily on the Court of Appeal case of **Bardi Limited v McDonald Millingen** [2018] JMCA Civ 33, particularly the judgment of Phillips JA in which at paragraph 24, the learned Judge quoted with approval the following extract from the judgment of Sir John Donaldson MR in the case of **WEA Records Limited v Visions Channel 4 Limited and Others** [1983] 2 All ER 589, at page 593:

> *"In terms of jurisdiction, there can be no doubt that this court can hear an appeal from an order made by the High Court on an **ex parte** application. This jurisdiction is conferred by s16 (1) of the Supreme Court Act 1981. Equally there is no doubt that the High Court has power to review and to discharge or vary any order which has been made **ex parte**. This jurisdiction is inherent in the provisional nature of any order made **ex parte***

> *and is reflected in RSC Ord 32, r6. Whilst on the subject of jurisdiction, it should also be said that there is no power enabling a judge of the High Court to adjourn a dispute to the Court of Appeal which, in effect, is what Peter Gibson J seems to have done. The Court of Appeal hears appeals from orders and judgments. Apart from the jurisdiction (under RSC Ord 59, r 14 (3)) to entertain a renewed* ***ex parte*** *application, it does not hear original applications save to the extent that they are ancillary to an appeal*
>
> *As I have said,* ***ex parte*** *orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side, and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.*
>
> *This being the case it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an* ***ex parte*** *order without first giving the judge who needed or, if he was not available, another High Court judge an opportunity of reviewing it in the light of argument from the defendant in reaching a decision."*

[15] Mr Hylton also submitted that the judgment in **Mitchell v Dabdoub** (supra) is not relevant because the issue was whether the filing of an appeal in an election petition matter operated as an automatic stay and the Court of Appeal held that it did not.

[16] Mr Hylton also submitted that a possible consequence of the submissions of the Applicant is that the Claimant would have the benefit of the freezing order until the 1st Defendant is able to have the opportunity of the Court of Appeal hearing its challenge to the injunction. I am not convinced that the issue of delay was one which occupied the mind of Sir John Donaldson MR in **WEA Records Limited** (supra), and whereas in this jurisdiction that would be a relevant factor, I will not make it a relevant consideration in my decision.

The Court's analysis

[17] In the Case of **Michell v Dabdoub** (supra) the result of an election was disputed and Reid, J on 29th June 2001 adjudged that Mr Dabdoub had been duly elected

in the election and on the same day Ms Mitchell took out a summons for a stay of execution. On 3rd July 2001 Ms Mitchell filed notice and grounds of appeal against this decision of the Judge and on the 9th July 2001 when the summons for a stay of execution came up for hearing, it was withdrawn on the basis that there was already a statutory stay of execution which had been deployed by the appeal having been filed as a result of the operation of section 20(f) of the Election Petitions Act. As a result of the withdrawal, Mr Dabdoub, by Motion, sought an order in the Court of Appeal that the order of Reid J had not been stayed because Ms Mitchell had not obtained an order for a stay of execution pursuant to the Court of Appeal Rules.

[18] Before the hearing of the motion, Mr. Walter Scott Attorney for Ms. Mitchell took a preliminary point challenging the jurisdiction of the Court of Appeal to hear the motion. He contended that:

> *1. There is no appeal from any Judgment or Order of the Supreme Court in the Summons for Stay of Execution.*
>
> *2. This Hon. Court has no original jurisdiction under either the Constitution or the Judicature (Appellate Jurisdiction) Act to make the Orders being sought in the Notice of Motion herein.*

Forte P, at page 3 of the judgment which has already been quoted herein, concluded that the Court of Appeal had jurisdiction.

[19] I accept the submission of Mr Hylton QC that the case of **Mitchell v Dabdoub** is good authority for the proposition that once a Notice of Appeal is filed in the Court of Appeal that Court has jurisdiction to hear all applications and to make all orders in matters incidental to the hearing of the appeal. I am not of the view that one can extrapolate from that decision to conclude that it is also authority for a general principle that once a Notice of Appeal is filed in the Court of Appeal, that Court has exclusive jurisdiction in respect of all applications in matters incidental to the appeal which has been filed.

[20] In my opinion, the case of **Bardi** clearly acknowledges that *ex parte* applications made before the judge in the High Court require a different approach from that which obtains where an order made *inter partes* is being challenged. The reason this is so is quite clearly explained by Sir John Donaldson MR in the case of **WEA Records** (supra) to which reference has already been made. The reason seen to be demonstrably sensible especially in the case of *ex parte* freezing orders and other interim relief.

[21] Interim injunctions and similar orders being interim remedies are governed by Part 17 of the Civil Procedure Rules, 2002 as amended ("CPR"). CPR 17.4(4) provides as follows:

> *(4) The court may grant an interim order for a period of not more than 28 days (unless any of these Rules permit a longer period) under this rule on an application made without notice if it is satisfied that-*
>
> *(a) in a case of urgency, no notice is possible; or*
>
> *(b) that to give notice would defeat the purpose of the application.*

CPR 17.4(5) provides that:

> *(5) On granting an order under paragraph (four) the court must-*
>
> *(a) fix a date for further consideration of the application; and*
>
> *(b) fix a date (which may be later than the date under paragraph (a)) on which the injunction or order will terminate unless a further order is made on the further consideration of the application.*

[22] These provisions of the CPR exemplify and illustrate the explanation by Sir John Donaldson MR as to the basis for the Judge of the Supreme Court maintaining the jurisdiction to hear challenges to *ex parte* orders issued by that Court. This is rooted in the, somewhat – "temporary" nature of these orders. The Judge at the *inter partes* hearing, is not conducting an appeal, and where the original order which was granted *ex parte* is being challenged, that Judge, or a Judge of coordinate jurisdiction in the Supreme Court ought to have the opportunity to hear

and determine that challenge, change, modify or correct the initial conclusion without the necessity for the intervention of the Court of Appeal.

[23] It is in this regard that the case of **Paul Chen Young** (supra) can be easily distinguished from **Bardi** (supra). In **Paul Chen Young**, the Judge had granted an order revoking the order of a Judge of concurrent or co-ordinate jurisdiction which had been made at an *inter partes* hearing, was, in effect, acting as a Court of Appeal. In my respectful opinion. The fact that the substantive matter was pending appeal and under the jurisdiction of the Court of Appeal, was not the determinative factor although it was stated in the order of the Court of Appeal as a reason for its decision.

[24] It must be appreciated that the case of **Paul Chen Young** is not being used by Mr. Dabdoub to support the position he is advancing based on any clearly expressed declaration by the Court of Appeal. The Court in that case did not pronounce the existence of a broad principle that once the substantive matter is before the Court of Appeal, the Supreme Court no longer has any jurisdiction to hear any application which may be considered to be to the substantive claim. However, Mr. Dabdoub is asserting that such a principle can be extracted from the orders of the Court of Appeal. The case of **Paul Chen Young** must therefore be analyzed in the context of its specific facts, and a glaring and distinguishing feature is the fact that it did not involve a Judge discharging an *ex parte* order.

The effect of the stay by the Court of Appel

[25] Mr. Hylton submitted that the fact that the Court of Appeal only ordered a stay in respect of a limited number of the Orders of Laing J, is relevant. Mr. Dabdoub has in my view, quite correctly, identified the fact that the Court of Appeal has stayed the substantive part of the judgment of Laing J, which is the portion being appealed and therefore the scope of the stay ought not to be seen to weaken the soundness of his submissions on the relevant principles to be applied. I do not find that the

stay by the Court of Appeal has affected the jurisdiction of this Court which I have found to exist.

CONCLUSION

[26] For the reasons expressed herein, I accept the general principle that because the freezing order in this case was made *ex parte* this Court retains the jurisdiction to deal with matters which directly arise from it including the Application for its discharge and the jurisdiction of this Court is not affected by the scope of the stay of execution that has been ordered by the Court of Appeal.

[27] By way of comment, although it does not have any impact whatsoever on my decision, my learned brother Batts J appears to have reached a similar conclusion because on 20th November 2020 he amended his order made on 5 October 2020 by deleting the words “property and assets” and inserting the words “real estate” in their place. On Mr. Dabdoub’s submissions, these amendments would be a nullity.

[28] Having found that this Court retains the jurisdiction to hear the 1st Defendant’s Notice of Application to set aside the freezing order made by Batts J on 5 October 2020, a date convenient to Counsel will be fixed for the hearing of the application.