IN THE COURT OF APPEAL

IN CHAMBERS

BEFORE: The Hon. Mr. Justice Graham-Perkins

BETWEEN	LINDA HILL et al	DEFENDANTS/APPELLANTS
AND	EDWARD WALLEN	PLAINTIFF/RESPONDENT

Bruce Baker for the appellants

Mrs. M. Forte for the respondent.

June 5, 1973

GRAHAM-PERKINS, J.A.:

On May 16, 1973, Parnell J. awarded the sum of $10,645.96 to the respondent on his claim for damages for negligence against the appellants. This sum represented 40% of the total sum awarded, the respondent having been held liable to the extent of 60%.

The record before me discloses that on May 21, 1973, there came on for hearing before Master Malcolm a summons seeking a stay of execution of the judgment of Parnell J., and that the learned Master made an order dismissing this summons on the ground that he had no jurisdiction to deal with the matter. The record discloses further that Notice and Grounds of Appeal in respect of the Master's "ruling" were filed on May 25, 1973. Thereby the appellants seek, inter alia, to have "the Master's ruling that he had no jurisdiction in the matter" reversed.

On May 31, 1973, the appellants caused another summons to be issued. This time they sought "an order for stay of execution pending the prosecution of this appeal". This summons came on for hearing before me on June 5, 1973. I am not quite clear as to the appeal to which the foregoing reference was intended. Mr. Baker's affidavit in support is so framed as to leave it to be inferred that an appeal has been lodged against the judgment of Parnell J. If it be the fact that such an appeal has been lodged then there are two appeals pending. It appears somewhat odd that there should be a summons before me seeking a stay of execution of the judgment of Parnell J. at the same time as there is pending an appeal against the Master's ruling on a similar sommons.

The real question that I am required to answer, however, is whether it would be proper for me to grant a stay of execution of the judgment of Parnell J. For the purpose of this question I will assume that an appeal against that judgment has in fact been lodged. I repeat that the record before me discloses the positive existence of only one appeal, i.e. against the Master's ruling. It does not appear that an application was made to Parnell J. to stay execution of his judgment at the time he gave it. Quite obviously this was the proper time for such an application, and the reason therefor is clear. The trial judge was then seized of all the relevant facts and he it was who should have been asked to order a stay. See Tuck v. Southern Counties Deposit Bank (1889), 42 Ch. D. 473. No reason is advanced for the failure to make the application to Parnell J. immediately upon the pronouncement of his judgment. What is alleged - and one has to refer to the document containing the grounds of appeal against the Master's ruling to discover this - is that "The action out of which this action arises was heard before the Honourable Mr. Justice Parnell and that Judge being on circuit the application came before the Master." Here again I am left in the dark I am not told, for example, the date on which Parnell J. left Kingston

to proceed on Circuit, or how long it was anticipated he would be away.

The question whether the learned Master had jurisdiction to deal with the matter is not any concern here. This is, as I have indicated, the subject of an appeal. What concerns me is that no application was made to Parnell J. If for some undisclosed reason it was considered desirable not to ask the learned judge to stay execution of his judgment at the time of its pronouncement the record does not disclose any reason why an application was not made to him within a reasonable time thereafter. See Republic of Peru v. Wequelin (1876), 24 W.R. 297. That the learned judge was on Circuit would have been but one relevant circumstance is resolving any question as to reasonableness.

Rule 21 (1) of the Court of Appeal Rules 1962 provided:

> "Except so far as the Court below or the Court may otherwise direct -
>
> (a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the Court below;

Rule 22 (4) provides:

> "Wherever under the provisions of the Law or of these Rules an application may be made either to the Court below or to the Court, it shall be made in the first instance to the Court below."

It seems perfectly clear that the effect of these Rules is that an application for a stay of execution should be made in the first instance to the "Court below", and that if it is refused an application may be made to the Court of Appeal. In Cropper v. Smith (1883) 24 Ch. D. 305, Brett, M.R., in dealing with the corresponding Rules under Order LVIII said, at p. 311,

> "....there is an independent jurisdiction in this Court to stay proceedings pending an appeal, but... the Court is not to exercise that independent jurisdiction until an application has been made to the same effect and decided upon in the Court appealed from, and that is the only condition limiting the exercise of the jurisdiction of this Court. It does limit the jurisdiction, it limits the exercise of it..."

Cotton and Bowen, L.JJ., reached the same conclusion; and I respectfully adopt it.

I am aware that in Brown v. Brook (1902) 86 L.T.R. 373, Collins, M.R. and Romer, L.J., thought that the Court of Appeal and jurisdiction to entertain an application in circumstances not dissimilar to those in this case. No reasons were given by either of the learned judges for their dicision. I am not persuaded as to the correctness of that decision. I would dismiss the summons herein with costs to the respondent to be agreed or taxed.

In the event that I am wrong in the conclusion at which I have arrived I would also hold that the Appellant has not shown that he is deprived of the fruits of his litigation it must at least be shown that if the damages and costs were paid over to him there is no reasonable probability of recovering them back if the appeal succeeds. See Baker v. Lavery (1885) 14 Q.B.D. 769. The affidavit in support of this summons does not, not, in my view, show that there is no such reasonable probability.