JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. C.A. 51 OF 1983

BEFORE: THE HON. MR. JUSTICE WHITE, J.A.

IN THE MATTER of all those Parcels of Land parts of Harmony Hall formerly parts of Tower Hill in the Parish of St. Mary being the Lots Numbered Two and Three on the Plan of Harmony Hall deposited in the Office of Titles on the 23rd day of July 1951, and being the land comprised in Certificates of Title registered at Volume 591 Folio 83 and Volume 591 Folio 84 of the Register Book of Titles

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IN THE MATTER of the Restrictions affecting the user thereof

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IN THE MATTER of the Restrictive Covenants (Discharge and Modification) Act

BETWEEN	LORRAINE MARIE ISSA	APPELLANT
AND	JOHN DAVID STANNARD CYNTHIA ANN STANNARD DANIEL GLOVEN HURLSTONE ST. CLAIR WHITEHORNE MICHAEL E.N. COSTA	RESPONDENTS

Michael Hylton for Respondents

Dr. L.G. Barnett & Jerome Lee for Appellant

On 15th & 16th April 1985

The Respondents in this matter applied by summons for an Order that execution of the Judgment of the Court of Appeal herein dated the 12th April 1984 be stayed pending the hearing of the Respondents' Appeal to Her Majesty in Council. The subject matter of this appeal to Her Majesty in Council is the order of the Court of Appeal that judgment be entered for the Appellant and that the modification of the covenants restricting the user of the several parcels of land be granted as prayed.

The order granting final leave to appeal was made on the 14th January 1985, and the other requisite steps have been taken to enable the Appeal to be prosecuted expeditiously.

Before me, Mr. Hylton for the applicants on the Summons argued that the basis of this application is the nature of the action. He argued that if the appellants were allowed to erect buildings and obtain and dispose of separate titles thereto, any successful appeal of the respondents before Her Majesty in Privy Council, would be wholly without value; the applicant would thereby be defeated by a fait accompli. That was in broad terms the rationale of the application. He expanded his submissions to deal with the agreed fact that the appellant has begun to build in the face of the progress in the appeal procedure, and is thereby seeking to frustrate the successful outcome of the appeal by the argument disclosed in the affidavit of Robert Cartade, that if the appellant is not allowed to continue building she will lose a lot of money. He canvassed other matters which in my view do not need to be dealt with at this stage considering that the question of locus standi is important at this stage.

In this regard I would quote Rules 5 and 6 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 which, as its title shows, governs the appeal

from a judgment of the Court of Appeal to Her Majesty in Council:

> "5 A single judge of the Court shall have power and jurisdiction -
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> a) to hear and determine any application to the Court for leave to appeal in any case where under any provision of law an appeal lies as of right from a decision of the Court.
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> b) generally, in respect of any appeal pending before Her Majesty in Council, to make an order and to give such directions as he shall consider the interest of justice or circumstances of the case require:
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> Provided that any order, directions or decision made or given in pursuance of this section may be varied, discharged or reversed by the Court when consisting of three judges which may include the judge who made or gave the order, directions or decision".

Thus, within the terms of those powers of a single judge, Rule 6 states:

> "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".

Whereas Mr. Hylton argued that dispite Rule 6 the Court had a general power as set out in Rule 5(b), Dr. Barnett reposted that Rule 5(b) is a general power which must be interpreted in the light of the specific provisions of Rule 6. The last rule identifies the person applying for a stay of execution as the appellant who is required - "to pay money or do any act" by the judgment appealed from.

Mr. Hylton argued that bearing in mind that Rule 6 of the Order in Council specifically limits itself to a judgment requiring the appellant to pay money or do any act, he

would concede that in a situation in which the judgment requires the appellant to pay money or do any act if the appellant were to apply under Rule 5(b) and not under Rule 6 the Court would have to consider whether the interest of justice and the circumstances of the case require the judge to make the order staying execution. On the other hand, where, as here, the judgment does not require the payment of money or the doing of any act by the appellant the appellant has no choice but to apply under Rule 5(b) because he cannot bring himself within Rule 6.

In support of all this, Mr. Hylton adverted me to the series of proceedings in this Court, and the order by this Court, initiated by The Gleaner Co. Ltd., and John Hearne v. Michael Manley SC CA No. 4 of 1983 and which culminated in the judgment of Zacca, P., (as he then was) in SC CA No. 39/84 between the same parties. Because the judgment is short I will quote it in extenso:

> "We have considered the arguments of the appellant that Theobalds, J. had no jurisdiction to grant the Orders made on July 6, 1984 in which he vacated the trial date set for September 17 and further ordered that no further order setting down the matter for trial be made until the pending appeal to Her Majesty in Council shall have been heard and determined. Mr. Hill referred us to section 5 (b) of the Jamaica (Procedure in Appeals to Privy Council) Order in Council, 1962 (Privy Council Rules) and submitted that having regard to the respective jurisdictions of the Superior Courts for Jamaica, power to grant a stay of proceedings when an appeal from the Court of Appeal is pending before the Privy Council is vested in a judge of the Court of Appeal whose decisions or directions are subjected to the Order of the Court of Appeal consisting of three Judges.
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> In our view the application by Summons to Theobalds J. to vacate the trial date of 17th September, 1984, and to further order that the action C.L. M-33/78 be not set down for trial until the pending appeal to Her Majesty in Privy Council shall have been heard and determined was in the nature of an application to stay the proceedings and not

> "merely to adjourn it to a fixed date. The order which the learned trial judge made was in terms of this Summons.
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> An application for stay of proceedings which is grounded upon the pendency of an appeal from this Court to Her Majesty in Council, should in our opinion be made according to the procedure in section 5(b) of the Privy Council Rules. Accordingly this appeal is allowed, the Order of the Court below is set aside and the appellant shall have his costs both here and below to be agreed or taxed".

As Dr. Barnett pointed out that judgment dealt with a stay of proceedings and not with a stay of execution. The cited case concerned the powers of the Supreme Court vis-a-vis the powers of the Court of Appeal when there is a pending appeal to Her Majesty in Council. But a stay of execution where there is an appeal to Her Majesty in Council is an entirely different matter, and is governed by the provisions of Rule 6, which I must emphasize, was not considered by the Court of Appeal in that case. There was nothing in the judgment to show that that rule was brought to the attention of the Court, and in the circumstances at the time it could hardly have arisen for consideration.

It is my decision that the respondents have not brought themselves within the provisions of the relevant order. They are not appellants who have been ordered to do an act or pay money. The decision of the Court of Appeal being appealed from does not in any way impose upon them any duty which they must fulfil for the benefit of the successful party. Except for the payment of costs which both parties did not regard as the matter of primacy, the appellant to Her Majesty in Council has nothing to do with the effectuation of the judgment of the Court, and which I was informed has resulted in the Registrar of Titles making the necessary endorsement on the Certificates of Titles. There is another consideration

that were I to make the order sought I would in effect be granting injunctive relief which is not what Rules 5(b) and 6 were designed for.

Accordingly, as I said after the hearing, I dismiss the application with costs to the plaintiff/respondent hereto.