

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO: 81/2005**

**SUIT NO: CLK 009/2001**

**APPLICATION NO: 146/06**

**BEFORE: THE HON. MRS JUSTICE HARRIS, J.A.**

**IN CHAMBERS**

<b>BETWEEN:</b>	<b>BEVERLEY LEVY</b>	<b>APPLICANT</b>
<b>AND</b>	<b>KEN SALES LIMITED &amp; MARKETING LIMITED</b>	<b>RESPONDENT</b>

**Conrad George and Weiden Daley instructed by Hart Muirhead Fatta,  
for the applicant**

**Miss Carol Davis for the respondent**

**December 19, 2006 & February 22, 2007**

**HARRIS, J.A:**

By a notice of application for court orders issued on December 11, 2006  
the applicant Mrs. Beverley Levy seeks the following orders:

"(i) a stay of execution of the order for costs of the  
Court of Appeal herein of 7<sup>th</sup> April 2006, pending the  
determination of the appeal herein to Her Majesty in  
Council.

(ii) a stay of execution of the Certificate of Taxation herein, dated 30<sup>th</sup> November 2006, pending the determination of the appeal herein to Her Majesty in Council."

It is necessary to outline briefly an account of the facts giving rise to these applications. On January 15, 2003, an order for sale of lands pursuant to a Judgment in favour of the respondent in suit CLK 009 of 2001, ***Ken Sales and Marketing Limited v Earl Levy and Trident Villas and Hotel Limited*** was made in the court below. By an order of May 2003, the order of January 15, 2003, was extended to April 10, 2003.

A further order was made by Campbell, J on January 19 2005, in the following terms:

"1. That the time for leaving with the Registrar of Titles certificate of sale for entry on the register pursuant to Orders for Sale first made in the suit herein by this Honourable Court on 15<sup>th</sup> January, 2003 be extended until completion of the sale of the lands."

The applicant, on May 4, 2005, made an application to set aside the order of Campbell, J on the following grounds:

- "(I) The Order of Mr. Justice Campbell made on the 19<sup>th</sup> day of January, 2005 on an ex parte application of the Claimant and the said Order was not served on the 1<sup>st</sup> and 2<sup>nd</sup> Defendants until the 2<sup>nd</sup> day of May 2005.
- (II) That an application was made by the Claimant and filed in this Honourable Court on the 11<sup>th</sup> day of April 2005 seeking an Order that the Registrar of Titles be directed to cancel or discharge certain mortgages and that certain caveats be overridden.

- (III) The Order of Mr Justice Campbell made on the 19<sup>th</sup> day of January 2005 was not served up to the 29<sup>th</sup> April 2005, the day the above application was part heard in this Honourable Court and first came to light at that part hearing.
- (IV) That a Charging Order in the present suit CLK 009 of 2001 was made by this Honourable Court on the 15<sup>th</sup> day of January 2003 and was entered on the certificate of title referred to in the said Order in the 17<sup>th</sup> day of January 2003 under Miscellaneous No. 1217188.
- (V) A further Order was made by this Honourable Court on the 14<sup>th</sup> day of May 2003 whereby the Order made on the 15<sup>th</sup> day of January 2003 was extended for a further period of six months from the 11<sup>th</sup> day of April 2003.
- (VI) The Order made on the 14<sup>th</sup> day of May 2003 expired on the 10<sup>th</sup> day of October 2003 and no further application was made to extend the said Order, until the application of the Claim and resulting in the Order of the Hon Mr Justice Campbell made on the 19<sup>th</sup> day of January 2005.
- (VII) By section 134 of the Registration of Titles Act "Every such writ or order shall cease to bind charge or affect any land, lease mortgage or charge, specified as aforesaid unless a certificate of sale under such writ shall be left for entry upon the Register within three months from the date on which such copy was served, or such longer time as the Court shall direct".

The applicant is not the registered proprietor of any of the lands forming the subject matter of the order for sale. She, however, sought to intervene in the original suit on the ground that she has an interest in the lands. In paragraphs

(5) and (6) of an affidavit filed by her on May 4, 2005, in support of her application, she states as follows:

- "(5) With regard to Caveat No. 1190019 this Caveat secures a loan from me to the 1<sup>st</sup> Defendant in the amount of \$6,567,736.50 together with interest thereon.
- (6) With regard to Caveat No. 1190018, this Caveat protects a charge over lands comprised in Certificates of Title registered at Volume 1157 Folio 129, Volume 1212 Folio 709 to secure a loan made by my company, Percy Junor Limited in the amount of US\$325,000 together with interest thereon."

On June 3, 2003 Pusey, J (Ag.) set aside the order of Campbell, J and ruled, inter alia, that the applicant had standing to have made the application to set aside the order. The respondent appealed Pusey's J (Ag.) order and on April 7, 2006, this court allowed the appeal with costs to the respondent (then the appellant).

Leave of this court to appeal to Her Majesty in Council challenging the judgment of the court was refused on May 18, 2006. Costs were awarded to the respondents. However, on November 30, 2006 the Privy Council granted the applicant special leave to appeal and ordered that costs be in the case.

The costs ordered by the Court of Appeal were taxed at \$1,472,860.57 and on November 30, 2006, Certificate of Taxation for the taxed amount was issued by the Registrar. This Certificate was duly served on the applicant on December 6, 2006.

On December 7, 2006 the applicant's attorneys-at-law wrote to Miss Davis the respondent's attorney-at-law giving their undertaking to pay the taxed costs should the appeal be determined in the respondent's favour.

The question as to whether this court is properly seized of jurisdiction to entertain the application within the purview of The Jamaica Procedure Appeals to the Privy Council Order in Council 1962 ("Privy Council Rules") was raised by Miss Davis. She argued that the court's powers to grant a stay must be considered not only in terms of the provisions of rule 5 of the Privy Council rules but that rule 5 must be construed within the context of rule 6. Rule 6, she argued, outlines specifically the power to grant a stay of execution. She further argued that in order to obtain a stay of execution the applicant must bring herself within the provisions of rule 6.

It was Mr. George's submission that rule 5(b) of the rules grants general powers to the court with respect to applications pending before the Privy Council. He argued that rule 6 is only applicable in circumstances where the application for a stay is being made before the Court of Appeal at the time during which the court grants conditional leave to appeal.

In light of the contention of the parties touching and concerning the construction of rules 5 and 6, it is important to set out these rules. Rule 5 states:

"A single judge of the Court shall have power and jurisdiction –

- (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;

- (b) generally in respect of any appeal pending before Her Majesty in Council, to make such order and to give such other directions as he shall consider the interests of justice or circumstances of the case require:

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."

Rule 6 provides:

"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."

Rules 5 and 6 assign to the court powers to make orders pending appeals to Her Majesty in Council. These rules, however, are separate and distinct. Rule 5 (b) clothes the court with general powers in making orders and giving directions if either the interest of justice or the circumstances so dictate. The powers prescribed by rule 6 are restricted. Rule 6 empowers the Court to grant or refuse a stay of execution. The exercise of these powers is limited to

circumstances "where the judgment appealed from requires the appellant to pay money or do any act."

The order which is sought to be enforced by the respondent relates to costs. In ***Jamaica Flour Mills v West Indies Alliance Insurance Ltd & Ors*** (1997) 34 JLR 244, a claim was brought by the appellant against the respondents for damages consequent on breaches found in two of their silos days after the passage of a hurricane. Judgment was entered in favour of the respondents. On Appeal, by a majority, judgment was awarded to the appellant with costs and the matter was remitted to the court below for damages to be assessed by the trial judge. The respondents, by way of a motion, sought and obtained leave of this court to appeal to her Majesty in Council but failed to obtain a stay of the order remitting the matter for assessment and also failed to secure a stay of execution of the costs. It was held, inter alia, that an order for costs does not rank as one requiring an appellant "to pay money or do an act" as prescribed by rule 6 of the Privy Council rules and that the provisions of that rule dealing with stay of execution are not applicable to costs.

Further, it is of significance to note that under rule 6 the execution of, or suspension of execution of a judgment can only be made at the time in which leave to appeal is granted. It follows therefore that rule 6 would not be relevant to this application.

It is my view that rule 5 (b) is the operative rule in this application. It authorizes a single judge to make an order and give directions with respect to

matters pending before the Privy Council and contemplates applications of this nature which would not ordinarily fall within rule 6. Rule 2.11 (b) of the Court of Appeal Rules 2002 empowers a single judge to order a stay of execution. It follows therefore that, applying rule 2.11 (b) of the Court of Appeal Rules in conjunction with rule 5 (b) of the Privy Council Rules, the court must consider whether the interest of justice or the circumstances of the case warrants an order of a stay of execution.

As a general rule, a successful litigant ought not to be deprived of the fruits of his litigation during the pendency of an appeal ***Monk v Barham*** [1891] 1 QB 346. Normally, a stay is not granted. In ***Leicester Circuits Ltd v Coates Brothers*** PLC [2002] EWCA Civ 47 at 37 Potter LJ said: "The normal view is for no stay ..."

It is the discretion of the court to grant or refuse a stay. ***AG v Emerson*** (1889) 24 QB D pp 58 and 59; ***Becker v Earl's Court Ltd*** (1911) 56 SJ 206. An applicant, seeking a stay must advance good grounds for requiring the stay by demonstrating a realistic prospect of a successful resolution of the issue or issues in his favour and that he would be ruined if the stay is not granted. This is the approach enunciated by Staughton LJ in ***Linotype- Hell Finance Ltd v Baker*** [1992] 4 All ER 887 which has been adopted by this Court in cases such as ***Jamaica Flour Mills Ltd v West Indies Alliance Co. Ltd & Ors*** (supra) and ***Flowers Foliage and Plants of Jamaica Ltd., Jennifer and Douglas Wright v Jamaica Citizens Bank Ltd.*** [1997] 34 JLR 448.

A court, taking into account all the circumstances of the case, ought to conduct a balancing test by weighing up the intrinsic dangers in granting or refusing a stay. In support of this proposition, in ***Hammond Suddard Solicitors v Argrichem International Holdings Ltd.*** [2001] EWCA Civ 1915, Clarke LJ said:

“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?”

The fundamental issue in the appeal is whether the applicant is entitled to intervene in the suit CLK 009 of 2001. Caveats had been lodged by the applicant against the lands in which the order for sale was made subsequent to the order. By these caveats she claims a lien over the lands by virtue of loans made by her to the 1<sup>st</sup> defendant in suit CLK 009/2001.

A term of the order for sale was that the lands should stand charged while section 134 of the sale is pending. Section 134 of the Registration of Titles Act deals with the binding or charging of land by writ, or judgment decree or order. The section states:

“No execution registered prior to or after the commencement of this Act shall bind, charge or affect

any land or any lease, mortgage or charge, but the Registrar, on being served with a copy of any writ or order of sale issued out of any court of competent jurisdiction, or of any judgment, decree or order of such court, accompanied by a statement signed by any party interested, or his attorney, solicitor or agent, specifying the land, lease mortgage or charge, sought to be affected thereby, shall, after marking upon such copy the time of such service, enter the same in the Register Book; and after any land, lease, mortgage or charge, so specified shall have been sold under any such writ, judgment, decree or order, the Registrar shall, on receiving a certificate of the sale thereof in such one of the Forms A, B, or C in the Twelfth Schedule hereto as the case requires (which certificate shall have the same effect as a transfer made by the proprietor), enter such certificate in the Register Book; and on such entry being made the purchaser shall become the transferee, and be deemed the proprietor or such land, lease, mortgage or charge:

Provided always that until such service as aforesaid no sale or transfer under any such writ or order shall be valid as against a purchaser for valuable consideration, notwithstanding such writ or order had been actually issued at the time of the purchase, and notwithstanding the purchaser had actual or constructive notice of the issuing of such writ or order.

Upon production to the Registrar of sufficient evidence of the satisfaction of any writ or order a copy whereof shall have been served as aforesaid, he shall make an entry in the Register Book of a memorandum to that effect, and on such entry being made such writ or order shall be deemed to be satisfied.

Every such writ or order shall cease to bind, charge or affect any land, lease, mortgage or charge, specified as aforesaid, unless a certificate of the sale under such writ shall be left for entry upon the register within three months from the day on which

such copy was served, or such longer time as the court shall direct."

Cooke, J.A. found that section 134 of the Registration of Titles Act did not by itself impose a charge on the land, that the order for sale expired after 3 months of the date of its making and was incapable of extension by the mode advanced by the respondents. McCalla, J.A. also found that the order for sale ceased to bind the land after the expiration of 3 months.

The court held, however, that the applicant was not an interested party within the meaning of Part 48 of the Civil Procedure Code Rule 48(1) 2002. Rule 48(1) states:

"This Part deals with the enforcement of a judgment debt by charging

- (a) land;
- (b) stock(including stock held in court) ; and
- (c) other personal property.

In this Part –

**"land"** includes any interest in land; and

**"stock"** includes shares, securities and dividends arising therefrom."

Rule 48(6) reads:

"(1) The persons specified in paragraph (2) have an interest in the charging order proceedings as well as the judgment creditor and the judgment debtor and are referred to in this Part as **"the interested persons"**.

(2) The interested persons are –

- (a) any person who owns the land, stock or assets to be charged jointly with the judgment debtor;
- (b) the company whose stock is to be charged;
- (c) any person who is responsible for keeping the register of stock for that company;
- (d) if the stock is held under a trust, the trustees or such of them as the court may direct;
- (e) if the stock is held by the judgment debtor as a trustee, such of the other trustees and beneficiaries as the court may direct;
- (f) if the stock is held in court, the registrar; and
- (g) any other person who has an interest in the personal property to be charged."

Rule 48.10 (1) provides:

"An application to discharge or vary a final charging order may be made by -

- (a) the judgment creditor;
- (b) the judgment debtor; or
- (c) any interested person."

Rule 48 (1) expressly specifies that land includes interest in land. The liens claimed by the applicant have been protected by the caveats registered on the documents of Title relating to the lands. It could be that the applicant has

an interest in the lands and consequentially could be adjudged an interested party.

The thrust of Mr. George's submission for seeking a stay is that the respondent is impecunious and if the stay is refused and the costs taxed are paid to the respondent, in the event that the applicant meets with success on her appeal, the sum paid will be irrecoverable.

The respondent, in an affidavit sworn by its managing director, Mr. Kenneth Biersay, on October 30, 2006, discloses that the company has been experiencing financial difficulties. Paragraph 26 of the affidavit states:

"My company has suffered great hardship given the long delay in payment for the materials sold to the Defendant. We are a small company, and while the Defendant did not pay, we had to meet the liability to our suppliers. Since this transaction my company has been in a constant cash flow crisis. We have had to borrow extensively to meet our commitments, and because we have been unable to meet payments we now ourselves face legal action from our creditors. Before the sale of the Defendant my company did not have these problems, but the long outstanding debt of the Defendant has thrown us into financial disarray. If my company does not recover the debt owed by the Defendant I verily believe that we will not be able to continue."

In a further affidavit filed on December 14, 2006, the respondent states:

"4 ... I say that the acute cash flow problems currently experienced by my company have been caused by the Defendant in the matter Earl Levy, the husband of the Appellant herein. From on or about 1994 my company sold certain building materials to the Defendant Earl Levy. Mr. Levy has not paid for the materials received by him, such that the sum of \$179,959,090 is currently due from him. Mr. Levy

has not sought to Defend the claim of my company, so that a judgment was entered against him in the suit herein in 2002. However my company has not been able to collect on the judgment. Certain land owned by Mr. Levy have now been sold pursuant to an Order for Sale in order that the judgment be enforced. However the Applicant, who is Mr. Levy's wife, together with Percy Junor Limited, a company of which Mr. Levy's said wife and his daughter are the major shareholders, and Pelican Securities Limited (a company of which Mr. Levy's Attorney is a director) have made repeated claims against Mr. Levy's said lands which I verily believe are intended to frustrate my company receiving the fruits of the judgment admittedly owed to it.

5. The cash flow problems experienced by my company have been caused because despite the fact that we have not been paid by Mr. Levy, we have ourselves been required to pay the suppliers who provided the goods that were sold to him.

6. Further even though my company does have severe cash flow problems, we have real estate and other estate which could if necessary be sold. Indeed we are already in process of completing sale of commercial premises at 57½ and 67 Slipe Road, and the proceeds of said sale should soon be available. Further we own premises at 84 Constant Spring Road, and 113 and 113A Constant Spring Road. In the circumstances I verily believe that my company would be in a position to repay the \$1,472,860.57 if so ordered by the Judicial Committee of the Privy Council."

The respondent is in the process of completing the sale of commercial premises at 57½ and 67 Slipe Road. They also own premises at 84, 113 and 113A Constant Spring Road. Valuations of these properties were not exhibited, nor was a statement as to the extent of the respondent's liabilities submitted. However, the fact that the respondent is experiencing cash flow problems do not

necessarily mean that it is or will be insolvent and would not be able to meet the costs of the appeal if required so to do.

The essential question is whether there is risk of injustice to either party should the stay be refused or granted. No evidence has been adduced by the applicant to show that she would be ruined if the costs are paid.

I am prepared to accept and take into account that the present financial circumstances of the respondent result from the failure of the 1<sup>st</sup> defendant in the original suit CLK 009/2001 to liquidate his indebtedness to the respondent. It is my view that the respondent should be paid their costs. The fact that the applicant seeks intervention in the matter ought not to operate as a bar to the respondent not being able to be the recipient of some of the fruits of their litigation. The existence of an offer of an undertaking by the applicant's attorneys-at-law to pay the costs should the applicant's appeal be unsuccessful would not avail her.

In my view, there is no risk that the appeal will be stifled if the stay is refused. Although I am not persuaded that if the stay is refused and the applicant is successful on appeal she would not be able to recover the costs paid to the respondent, since the liabilities of the respondent and the value of their assets are unknown, in the interest of justice I deem it necessary in refusing the stay to impose a condition on them for the repayment of the costs if required so to do.

**HARRIS, J.A:**

**ORDER**

Application for stay of execution refused. The applicant is to pay the outstanding costs.

It is further ordered that within 14 days of payment of the costs, the respondent enter into a bond in the sum of \$1,472,860.57 with a surety for the repayment of the costs should the applicant's appeal be successful.

Costs to the respondent to be agreed or taxed.