

11/10/07

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. CL 1997/L 064

BETWEEN LLOYD DIXON & COMPANY LTD. PLAINTIFF
A N D Y.P. SEATON & ASSOCIATES COMPANY
LIMITED DEFENDANT

IN CHAMBERS

Mr. Lawrence Haynes and Mr. Lloyd Dixon for claimant.

Mr. André Earle and Miss Anna Gracie instructed by Rattray, Patterson, Rattray for defendant.

Heard: 20th September 2006 and 26th July 2007

Campbell, J.

(1) On 27th May 1997, the claimant brought an action by specially endorsed Writ of Summons claiming the sum of \$11,038,813.00 against the defendants. On the 21st October 2004, the Court gave judgment in favour of the claimant for the sum claimed with interest at the rate of 20% per annum from the date of service of the Writ of Summons to the date of payment.

(2) The defendant has applied for a Stay of Execution of the Judgment, until the determination of appeal in this matter.

Among the grounds listed are that;

- b) that should the Claimant be allowed to execute the Judgment which is in excess of Twenty Seven Million Dollars (\$27,000,000.00) inclusive of interest to date it would ruin the Defendant.

c) That the Defendant has a good and meritorious case which is likely to succeed on the Appeal.

(3) In an affidavit filed in support of the application, Mr. York Page Seaton exhibits the audited statements of the defendant to demonstrate the defendant's inability to pay the judgment debt plus interest. He also depones that the defendant would be severely prejudiced in that it would most likely be unable to recover that sum in the event of the defendant's appeal being successful, as the claimant would not have the resources to repay same.

(4) Applications for stay of judgment debts are dealt with pursuant to Civil Procedure Rules 2002, 42.13.

Rule 42.13 provides:

A judgment debtor may apply to the court to stay execution or other relief on the grounds of-

(a) matters which have occurred since the date of the judgment or order; or

*(b) facts which arose too late to be put before the court at trial.
And the court may grant such relief, upon such terms, as it thinks*

just.

(5) The applicant does not rely on these rules, which it is noted makes no mention of an Appeal. The applicant submitted that the Court must use its commonsense and balance the *advantage of the competing rights of the judgment creditor not to be deprived of the fruits of his victory against any good or sufficient reason advanced by the judgment debtor.* See **Winchester Cigarette Machinery Ltd. v Payne and Another (no.2)** TLR Dec 15, 1993.

(6) One such good reason was demonstrated in an application under the **(Emergency Powers) Act, 1939**, in wartime England, where leave was given to appeal a money judgment. In this case cited by Mr. Earle, the Court of Appeal held that the debtor should have a Stay of Execution, because on payment of the sum, the substratum of the appeal would be lost. The learned Master of the Rolls, Sir Wilfred Greene, who delivered the judgment of the Court, restricted the views of the Court to those special class of cases. **Metropolitan Real and General Property Trust Limited and others v Slathers and Bodega Limited 1941 1 All ER 310.**

(7) The applicant places reliance on the learning in the Court of Appeal 1992 decision in **Linotype – Hell Finance Ltd. V Baker (1992) 4 All ER 887** where it was held that it is a legitimate ground for granting the application for a stay where the defendant is able to satisfy the court that without a stay he will be ruined and that the appeal has reasonable prospect of success. It is important to note that where the application proceeds on the basis of the ruination of the defendant, both limbs are to be satisfied. If the debtor is likely to be ruined and his appeal has no chance of success, the balance of advantage is against him. The advantage is reversed, however, if the debtor is likely to succeed. What then would be the purpose of having him pay the judgment debt if he is assured of success on appeal. Mr. Earle argued that there was real prospect of success in the appeal that was filed and rehearsed several points of those arguments before me.

(8) Mr. Haynes for the claimant felt that the defendant has no real prospect of success at Appeal. He submitted that it was Mr. Sanford's duty to certify payment and his testimony which the Court accepted undermines the defendant's case. The Court was

referred to page 8 (20 of the Judges Bundle) to illustrate the learned judge's findings of vital admissions of Mr. O'Connor. Mr. O'Connor, being vital to the defendant's case. He submitted that the sole outstanding issue was whether the claimant was entitled to 20% of the gross or net receipts. That issue he argued was not seriously pursued at trial. On the question of breach between the main contractor and the sub-contractor, according to Mr. Haynes, the learned judge addressed those issues and found that O'Connor's testimony amounted to hearsay. Similarly, the evidence of O'Connor was assailable in respect to the financial claims.

(9) The witness statement of O'Connor at paragraph 24 admits to an approved variation of \$42,364,211.20, and having done a computation on twenty percent of the net profit, concluded that the claimant was entitled to \$508,370.52. After almost a decade, no attempt has been made to pay this amount which, on the admission of the defendant is due. Mr. Haynes argues that this demonstrates a reluctance on the defendant's part to satisfy any portion of the claim. The Court's reason for accepting that the 20% is applicable to the gross profit and not net profit is, with respect, sound.

(10) The Court is aware that it is too stringent a test to say that the sole ground for the grant of a Stay of Execution is the inability of the judgment creditor to refund the judgment debt should the applicant succeed at the Appeal. However, that spectre has not been raised before me. There is no evidence adduced that the claimant would not be able to refund any sum that comes to its hand as a result of this application. I find that the applicant's prospect of success on appeal is greatly diminished by the admissions in the evidence of O'Connor. The balance of justice tilts the advantage in favour of the judgment creditor.

(11) The judgment creditor has sued in relation to a claim that arose more than ten years ago. Despite the admission of the defendant as to an amount due to the claimant, no effort has been made to pay that sum. The judgment creditor gained judgment on 21st October 2004. Interest accrues on the debt at the rate of \$6,048.67 per day. He has been detained from the fruits of his victory for too long.

It is hereby ordered that of the judgement sum, the defendant pays the judgment creditor the sum of \$8,472,842.20 forthwith.

Costs to the claimant to be agreed or taxed.

