JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 128 OF 2007

APPLICATION NO. 182A OF 2007

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

IN CHAMBERS

BETWEEN:	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**1ST APPELLANT**
AND	**N.C.B. TRUST & MERCHANT BANK JAMAICA LIMITED**	**2ND APPELLANT**
AND	**ROBERT FORBES**	**RESPONDENT**

Mr. Garfield Haisley, instructed by Vaccianna & Whittingham for the Appellants.

Miss Suzette Wolfe, instructed by Crafton S. Miller & Co. for the Respondent.

January 15, and February 13, 2008

HARRIS, J.A.

This is an application by the appellants for a stay of execution of a decision of Beswick, J. made on November 15, 2007.

The respondent is a businessman and had been a customer of the 1st appellant for many years. He possesses limited literacy skills. Mr. Kimel

Allen, Manager of the 1st appellant's Cross Roads Branch, was a friend of the respondent. He personally supervised the respondent's accounts. Mr. Allen would present documents to him, which, he would execute.

In June 1993, he applied for a loan of $10,000,000.00 but obtained one for $7,000,000.00 from the 1st appellant. He deposited with the 1st appellant three duplicate Certificates of Titles. At that time he signed a letter of commitment relating to the loan of $7,000,000.00.

On March 17, 1995 he signed yet another letter of commitment but with respect to a sum of $6,500,000.00. This document required him to submit to the 1st appellant an assigned policy of insurance coverage on his life, land surveyors certificates, land taxes certificates and peril insurance coverage. It was stipulated in the letter of commitment that the offer therein would be cancelled if it was not accepted by March 31, 1995. The requisite documents were never submitted by the respondent.

He executed several documents in blank, which he asserted he had done in the belief that they related to the $7,000,000.00 loan. In early 1994 he executed two blank cheques at Mr. Allen's request. His statement of account from the 1st appellant for January 1994 disclosed a deposit and subsequent withdrawal of $5,600,000.00 entered on the same date. His statement of account for March 1994 reflected entries of a credit and debit of a similar amount, on the same date.

It was asserted by him that he had neither written a cheque for the sum reflected on the statements nor did he receive the sums. This prompted him into making inquiries of the 1st appellant's officers as to the reason for the entries on the statements of account.

On one occasion, he said he was informed that the payments on the $7,000,000.00 loan had increased for the reason that the 2nd appellant had granted him a loan of $4,500,000.00 which he had repaid and a further loan of $6,500,000.00 had been granted to him to satisfy the $4,500,000.00 indebtedness.

He continued to make payments on the loan of $7,000,000.00 and stated that he requested that the 1st appellant make investigations into his presumed liability for $6,500,000.00.

In December 1997 he was informed by an officer of the 2nd appellant that he owed $27,000,000.00. She made a request of him that he execute a mortgage instrument for the registration of that sum on the three Certificates of Title which were deposited with the 1st appellant. He signed the document but asserted that he had done so under protest. Two mortgages were endorsed on the Certificates of Title, one for $7,000,000.00 and the other for $6,500,000.00

Subsequent to this, the respondent declaring that he had repaid the loan of $7,000,000.00, requested the return of his titles. The appellants refused to

accede to his request. This caused him to commence an action against the appellants claiming the following:

> "1. A Declaration that the Mortgage or loan of $7 million has been fully repaid together with the interest thereon.
>
> 2. A Declaration that the alleged Mortgages or loans of $6.5 million and $27 million are null and void.
>
> 3. That the defendants account to the Plaintiff for all sums paid to the Defendants to liquidate the loan of $7 million.
>
> 4. A Refund of any sum overpaid by the plaintiff to the defendants or any sum wrongfully deducted from the plaintiff's account with the defendants.
>
> Return to the plaintiff of all securities held by the defendants as security for the said loan especially the Duplicate Certificates of Title registered at Volume 1205 Folio 388 and Volume 1200 Folios 657 and 658.
>
> 5. Interest at the Commercial Bank rate.
>
> 6. Damages for breach of the Duty of Care.
>
> 7. Costs..."

The appellants filed a defence and counterclaim. They alleged that the respondent was fully cognisant of all loans granted to him. These, they averred, he failed to repay. It was also their averment that the sum of $27,000,000.00 included loans of $7,000,000.00 and $6,500,000.00 together with interest and penalties accruing thereon.

In evidence adduced by the appellants, it was disclosed that at the date of the respondent's receipt of the loan of $7,000,000.00 he had already been indebted to the 1st appellant by way of overdraft facilities as a consequence of which he was given commercial paper loans to the extent of $5,600,000.00. Three Promissory Notes amounting to $6,500,000.00 were exhibited in evidence. All were executed by the respondent. It is of significance, however, that none of these amounts referred to in the Promissory Notes were pleaded in the counterclaim.

An order was made by the learned trial judge in the following terms:

> "(1) a Declaration that the Mortgage or loan of $7,000,000.00 has been fully repaid together with the interest thereon.
>
> (2) a Declaration that the alleged Mortgages or loans of $6,500,000.00 and $27,000,000.00 are null and void.
>
> (3) to return to the Claimant all securities held by the Defendants as security for the said loan especially the Duplicate Certificate of Title registered at Volume 1205 Folio 388 and Volume 1200 Folios 657 and 658.
>
> (4) damages for breach of the Duty of Care in the amount of $700,000.00 per year from the date of service of the Writ of Summons until the date of payment. Where damages involve a portion of a year, those damages are to be calculated per month or part of a month. Interest on the damages at the rate of 6% per annum from the date of service of the Writ of Summons until June 12, 2006 and at the rate

> of 3% per annum from June 13, 2006 until today.
>
> (5) Counterclaim fails. Judgment for the Claimant, Mr. Forbes on the counterclaim.
>
> (6) Costs to Mr. Forbes to be agreed or taxed."

The grant or refusal of a stay of execution resides within the discretion of the court. The principles governing the grant of a stay of execution have been pronounced in the case of **Linotype-Hell Finance Ltd. v. Baker** [1993] 1WLR 321 in which Staughton L. J. said at page 323:

> "It seems to me that, if a Defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution."

The foregoing tests have been adopted with approval in this court in the case of **Flowers Foliage and Plants of Jamaica Ltd., and Others v. Jamaica Citizens Bank Ltd.** [1997] 34 J.L.R. 448.

The court, however, in the exercise of its discretion, ought to embark on a balancing exercise and weigh up the inherent risks or dangers consequential upon the grant or refusal of a stay. The focus of the court must be placed on the risk of injustice to either party. I am fortified in this view by a dictum of Clarke L.,J. in **Hammond Studdard Solicitors v. Agrichem International Holding Ltd.** [2002] EWCA Civ 2065, when he 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 first question arising is whether the appellants have a good prospect of successfully pursuing their appeal.

On disbursement of the $7,000,000.00 loan, the respondent was committed to repay monthly installments of $228,221.34 over a 15 year period. The loan was disbursed in September 1994 and on the respondent's evidence it was repaid in April 2001. He admitted making late payments which attracted penalties. These penalties were not included in the repayments. This the learned trial judge acknowledged. There is no evidence that these penalties were waived, which was recognised by the learned trial judge. She found, however, that the loan had been fully repaid. It may be that the principal and interest accruing thereon have been paid but it is clear that the penalties are still outstanding.

Can the debt of $7,000,000.00 be said to have been satisfied in the absence of payment of penalty charges which the respondent was obliged to

pay? It appears to me that a determination as to whether the respondent had fully met his indebtedness of the $7,000,000.00 loan would have required an order for and the taking of accounts, which, had not been made. It is evident that in these circumstances the appellants would have a strong arguable ground of appeal touching the repayment of the loan.

Mr. Haisley submitted that there was evidence from the appellants that the respondent obtained a further loan of $6,500,000.00 to extinguish his commercial paper debts. These debts, he argued, were evidenced by three Promissory Notes executed by the respondent for $5,600,000.00. It was further submitted by him that even if the learned trial judge correctly found that the loan of $6,500,000.00 was null and void she erred in not ascribing liability to the respondent for the $5,600,000.00.

Although the respondent executed the letter of commitment with respect to this loan, the requisite conditions in support of the grant of that sum were never met. The learned trial judge found not only that the conditions were never complied with but also that there was no waiver of the conditions by the appellants. She went on to state:

> "33. In my view the Trust would not release $6.5 million without ensuring that the money was properly secured. The Trust's expected interest in protecting its funds should be heightened by the fact that they had said that Mr. Forbes was already unable to properly service the $7 million loan and previous debts.

> Further, NCB had also indicated that Mr. Forbes' income could not service the original amount of $10 million that he had sought.
>
> 34. Considering that the Trust regarded Mr. Forbes as being in clear default of a $7 million loan and at least one other, why would the Trust lend a further $6.5 million to him without conditions being met and proper security being given?"

She rejected that the loan was made. It is my view that the appellants would encounter difficulty in persuading an appellate court that the learned trial judge was wrong in concluding that the $6,500,000.00 was in fact a loan to the respondent.

So far as the commercial paper debts for $5,600,000.00 are concerned, these were never pleaded in the counterclaim. These debts as alleged would have had to be grounded on the pleadings.

A further issue to be addressed relates to the award of damages to the respondent. The learned trial judge found that the appellants, in the capacity of bankers owed a duty of care to the respondent. She went on to award damages in the sum of $700,000.00 per year from the date of the service of the Writ to the date of payment.

Special damages of loss were neither pleaded nor claimed by the respondent. This, the learned trial judge did not fail to acknowledge. She found that the respondent sustained loss by reason of him being deprived of the use of his titles. She stated that no evidence was advanced by which she could be assisted in making an assessment of the respondent's loss. An award of general damages by way of nominal damages was made by her. In ascertaining the measure of damages for the purpose of quantifying the award, she said:

> "As a guide, I adopt a standard formula used in legal transactions for value of land and that is the gross annual value, computed as 10% of the actual value of the land.
> The value of the loss of use of the land annually I compute as its gross annual value, that is 10% of the actual value. The bank had retained the titles as security for a $7 million loan, at least. I therefore find on a balance of probabilities that that was the minimum value of the land. Its gross annual value would therefore be $700,000.00 and consequently I use that as representing the amount that Mr. Forbes lost annually by not having the freedom to charge his land as he saw fit."

There is no doubt that nominal damages may be awarded where loss is shown but the necessary evidence as to ascertaining the amount is not adduced. However, in the case under review, the question is not merely one of proof of loss but one as to whether there is evidence on which the amount of loss can be measured. This, in my opinion, raises a good arguable ground as to whether the learned trial judge was correct in adopting the method of using a presumptive value of the land in assessing the respondent's loss, or whether there ought to

have been evidence of the actual value of the land by which the annual value could be calculated.

I now turn to the question as to whether there is a risk that the appellants would be ruined if the stay is not granted. No evidence has been adduced by the appellants to show that they would be ruined in the absence of a stay. This, however, may not necessarily operate against the appellants successfully pursuing their application.

The appellants contend that the respondent had exhibited some amount of delinquency in meeting his obligations to them. As a consequence, they apprehend that if the Certificates of Title are returned to him, the damages and costs awarded are paid to him and they are successful in the appeal, there is some doubt that they will be able to recover the Titles and sums paid. It was also their contention that, with the exception of the property to which the Titles relate, the respondent is not in possession of adequate assets to meet the repayment of any amounts paid to him, should the occasion arise.

There is an issue as to whether the respondent had fully satisfied his indebtedness to the appellants with respect to the loan of $7,000,000.00, as I earlier pronounced. This sum has been endorsed on the titles by way of a mortgage. The creation of the mortgage would confer on the appellants an

equitable interest in the property. Until the appeal is determined, the appellants are endowed with all rights of a mortgagee and would be entitled to retain the titles. It follows therefore, in light of the mortgage, the appellants' interest ought to be protected.

The respondent avers that he would be able to repay sums found due and owing on the $7,000,000.00 loan, if any. He is the owner of a hotel on the lands contained in the relevant Certificates of Title deposited with the appellants. An estimated valuation of $220,000,000.00 is placed on the property by him. It is most significant that, over the years, the respondent had not shown himself to be a reliable customer of the 1st appellant. There is compelling evidence demonstrating that he failed to promptly honour his obligations with respect to the $7,000,000.00 loan. Further, acting on the advice of the 1st appellant, the respondent had once attempted to subdivide and sell a part of the hotel, in order to satisfy the $7,000,000.00 indebtedness. This venture failed. It may be that any endeavour by the appellants to recoup any sums due from the respondent by way of sale of the property may prove to be an arduous task.

It seems to me that the appellants may experience difficulty in recovering the damages and cost which they are required to pay to the respondent, should the appeal be decided in their favour. The appellants do have a real chance of success on appeal. In the circumstances of this case, to refuse a stay, for the

reason that the appellants have not shown that they would be ruined would be unjust and unfair. The justice of this case demands a stay of execution of the judgment of the learned trial judge.

ORDER

It is ordered that there be a stay of execution of the judgment of Beswick, J. delivered on November 15, 2007, pending the hearing of the appeal.

Costs to the appellants, to be agreed or taxed.