

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 55/2014**

**APPLICATION NO 106/2014**

<b>BETWEEN</b>	<b>ROBERT RAINFORD</b>	<b>APPLICANT</b>
<b>AND</b>	<b>HIS EXCELLENCY THE MOST HONOURABLE SIR PATRICK ALLEN</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	<b>THE PUBLIC SERVICE COMMISSION</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>AND</b>	<b>THE CHIEF PERSONNEL OFFICER</b>	<b>3<sup>RD</sup> RESPONDENT</b>

**Douglas Leys QC and Duane Thomas instructed by Duane O Thomas & Co for the applicant**

**Mrs Nicole Foster-Pusey QC and Miss Monique Harrison instructed by the Director of State Proceedings for the respondents**

**5 and 12 August 2014**

**IN CHAMBERS**

**MCINTOSH JA**

[1] In a notice headed "Notice of Application for Court Orders for Stay of Execution of Judgment and/or Stay of Further Proceedings" filed on 24 June 2014, the applicant sought the following orders:

- "1. A stay of execution of the Judgment of the Honourable Mr Justice Batts J [sic] dated June 6, 2014 pending the appeal of the said decision.
2. A stay of all further proceedings consequent on the said Judgment of the Honourable Mr Justice Batts J [sic] which the 1<sup>st</sup>, 2<sup>nd</sup> and/or 3<sup>rd</sup> Respondents/Defendants may institute in particular:
  - a. Effecting any suspension of the Appellant/Claimant;
  - b. Any further proceedings before the Privy Council considering the recommendation of the Public Service Commission concerning the dismissal of the Appellant/Claimant pending the determination of this appeal."

[2] At the very outset, the learned Solicitor General, Queen's Counsel for the respondents, raised as a preliminary issue, the appropriateness of this application in light of the declaratory nature of the judgment of Batts J and decisions emanating from this court to the effect that declaratory judgments ought not to be the subject of a stay of execution. The learned Solicitor General in her written submissions highlighted the second and third orders of Batts J which were as follows:

- "(b) A Declaration that the Claimant is entitled to an opportunity to consider whether he wishes the matter referred to the Privy Council as per the advice contained in the letter dated 25<sup>th</sup> September 2013.
- (c) That time for the purpose of computing the relevant 14 day period mentioned in the letter dated 25<sup>th</sup> September 2013 shall commence to run from the date of delivery of this Judgment."

It was against this order that the applicant filed his notice of application, but, submitted the learned Solicitor General, the orders he sought at 2a and 2b of his application (as set out at para [1] above) were not matters addressed in the judgment of Batts J for which an order for a stay could properly be granted.

[3] The learned Solicitor General submitted that it was clear from the applicant's supporting affidavit that there is nothing in the issues of concern which directs a party to take any particular step or to carry out any particular action. All that the orders do that the applicant seeks to stay, are to declare a right which he would be free to decide whether to carry it out or not. The judgment was therefore in essence a declaratory judgment, she submitted and the Court of Appeal has long established that a stay of execution is inapplicable to declaratory judgments.

[4] To bolster this submission the learned Solicitor General cited the cases of **Norman Washington Manley Bowen v Shahine Robinson and Anor** [2010] JMCA App 27 and **Carmen Farrell et al v Lascelle Reid and Ors** [2012] JMCA App 16. She made particular reference to paragraph [10] of the **Bowen** case, where Morrison JA highlighted the distinction between an executory judgment, which orders a party to act in a particular way such as an order to pay damages and, a declaratory judgment, which makes a pronouncement in regard to a party's status (approving and applying the distinction in Zamir & Woolf's Declaratory Judgment 2<sup>nd</sup> edn para 1.02). In the instant case she submitted that all that the judgment of Batts J did was to make it clear that the applicant was entitled to make an application to the Privy Council and that he

has done, within the time limited for the application. It was not an order enforceable against any of the respondents, the learned Solicitor General pointed out in her written submissions, but rather a declaration that the applicant's right to have the matter referred to the Privy Council remained. Having become aware of this application the Privy Council has indicated in a letter addressed to the applicant's instructing counsel and copied to the learned Solicitor General that it will not proceed with the reference pending the outcome of the applicant's application for a stay. In sum therefore the second order of Batts J is declaratory and there is no basis for a stay.

[5] Mr Leys, QC contended that by virtue of rule 2.11(b) of the Court of Appeal Rules 2002 ('the CAR') a single judge of the court is empowered to grant "a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal". Thus, argued learned Queen's Counsel, this rule confers a wide discretion on the court as to the circumstances in which a stay will be granted. He conceded, however, that the stay of execution aspect of the application was not appropriate as the learned Solicitor General's submissions were correct that declaratory judgments are not subject to the grant of a stay of execution and the judgment of Batts J was a declaratory judgment.

[6] He nevertheless submitted that a distinction is to be made between a stay of execution of a judgment and a stay of proceedings and it is this aspect of the application that the applicant is pursuing. Those are the proceedings before the Privy Council and the need for a stay of those proceedings pending the outcome of the

applicant's appeal, filed on 19 June 2014, is bolstered by the letter issuing from the Privy Council referred to by the learned Solicitor General indicating that the matter referred to it will not proceed pending the outcome of this application filed on 24 June 2014.

[7] Mr Leys QC referred to paragraph 9 of the applicant's supporting affidavit in which he expresses fear that "unless restrained further the Respondents will not await the determination of this appeal before acting having regard to their past behaviour. If there is no stay of execution of the judgment or stay of further proceedings in place, the appeal would be rendered nugatory". This, said learned Queen's Counsel, is what has triggered the application for a stay and it was his submission that the court has the power to grant such a stay. When one looks at all the circumstances of this case, Mr Leys QC submitted, it merits the court's consideration of granting a stay to preserve the status quo until the appeal is heard and determined.

[8] In the **Bowen** case relied on by the respondents, the application was for a stay of the judgment. The application in the instant case is for a stay of proceedings and by virtue of the provisions of rules 2.11(b) and 2.14 of the CAR it is clear that there is an undoubted power in the court to grant a stay of proceedings.

[9] The decision of Batts J was a declaratory order, Mr Leys QC reiterated and, following on those declarations, the Privy Council awaits the order of the court. Armed with those declarations, the Privy Council is going to consider the applicant's reference to the Council which involves the letter of dismissal issued to him with effect from 26

September 2013, but that date of dismissal is erroneous and the Privy Council ought not to have this as a relevant consideration when reviewing the decision of Batts J, contended Mr Leys QC. The applicant was suspended on 20 June 2014 and the applicant's contention is that any dismissal must be after that date, he argued. It is that status quo which the applicant is seeking to preserve. If that is not preserved and the 26 September date is maintained the appeal would be rendered nugatory, learned Queen's Counsel submitted.

[10] In sum, learned Queen's Counsel contended, the court has to look at the peculiar characteristics of this case. The applicant's only recourse is to appeal the declaratory decision. He submitted that it does not follow inexorably that because it is a declaratory judgment the court cannot grant a stay. He highlighted paragraph [13] of the **Bowen** decision where there was a reference to para 2408 of the work of Mr P W Young QC in which the author wrote "...if an appeal is lodged against a declaratory order, conceptually there can be no stay of proceedings" but, learned Queen's Counsel submitted, that concept has been shattered in this case where the potential for injustice is manifest. To preserve the status quo, Mr Leys QC urged the grant of a stay of proceedings until the appeal has been heard.

[11] To the extent that Mr Leys QC turned his attention to a stay of proceedings instead of a stay of execution of the judgment of Batts J, the learned Solicitor General was invited to amplify her submissions to embrace this aspect of the application. Accordingly, in relation to paragraph 2b of the application, seeking a stay of all further

proceedings which the respondents may institute, the learned Solicitor General pointed out that the judgment does not require any of the respondents to institute any proceedings. She submitted that this court would not be able to stay proceedings before the Privy Council because there was no order of the court below requiring that such proceedings take place. The submission continued thus:

“the fact that the appellant chose to file an appeal before the Privy Council or chose to make a reference does not in and of itself place those proceedings before the court so as to facilitate a stay of those proceedings.”

[12] The learned Solicitor General cited the case of **Director of Public Prosecutions v Mark Thwaites et al** (SCCA No 14/2009, Application No 39/2009 judgment delivered on 5 March 2009) where a stay of execution was sought of proceedings in the Resident Magistrate’s Court on an appeal from a decision in the Supreme Court granting certain declarations pertaining to matters in the Resident Magistrate’s Court. The application was first refused by a single judge of this court and on an application to the full court to vary or discharge that order the court had this to say:

“So far as the request for a stay of the proceedings in the Resident Magistrate’s Court is concerned we accept the submissions, and we are confident that we are correct in so accepting, that the Resident Magistrate’s Court proceedings are not before us. That being so, there is nothing for us to grant a stay.”

The court referred to the decision of **Attorney General et al v Jeffrey Prosser et al** from the Court of Appeal of Belize, Civil Appeal No 7/2006, judgment delivered on 8

March 2007 to similar effect. Thus, submitted the learned Solicitor General, in the same way that the court held that the Resident Magistrate's Court proceedings were not before it, so also the Privy Council proceedings are not before this court so as to facilitate a stay of those proceedings.

[13] The Privy Council proceedings were initiated by the applicant himself and were not anything mandated by the court, said the learned Solicitor General. Further, she submitted, the questions that the applicant wishes to have this court determine both in the application and in the appeal itself are premature as when the application goes before the Privy Council it is open to the Privy Council to advise the Governor General on the issue of the applicant's dismissal. Even if it feels that the charges are proved, it is open to the Privy Council to recommend a different kind of punishment and not to accept the recommendation for dismissal, she said. That is why the application to the Privy Council is in her view of more benefit to the applicant. The effective date of dismissal is a matter which can be argued before the Privy Council as those proceedings are in the nature of an appeal, she submitted.

[14] The reference by learned Queen's Counsel to preserving the status quo is unclear, the learned Solicitor General contended. It is his own reference to the Privy Council that has resulted in his suspension as, but for that move on his part, his dismissal would have taken effect from September 2013, she said.

[15] Turning to learned Queen's Counsel's submission on the distinction between a stay of proceedings and a stay of execution, it was the Solicitor General's view that the

distinction is not correct so that the result would be the same in either application, namely, that there can be no stay of proceedings. Further, counsel had indicated that he was relying on rule 2.11(b) of the CAR which speaks to a stay of execution of a judgment so that in conceding on that aspect of the matter his ability to rely on that rule would fall with his concession.

[16] Additionally, the learned Solicitor General submitted, rule 2.14 by its very heading and wording also refers to a stay of execution so that neither rule 2.11(b) nor rule 2.14 can provide a basis for the application. The court is therefore left with no statutory basis to support this application. In her view, the preliminary point would therefore have sufficiently disposed of the matter and nothing has been put before the court to provide a basis for the grant of the application.

**Is this an appropriate case for the grant of a stay?**

[17] It seems to me that the submissions of the learned Solicitor General are on solid ground and were not eroded in any way by the response of learned Queen's Counsel for the applicant. Whether or not the CAR gives the court the wide discretion which Mr Leys referred to, what is of importance in determining this application, after taking into account the concessions he rightly made, is whether there are any proceedings before the court which can be stayed. Clearly there are none. The order of Batts J was complete. The matter was finished. Nothing remained to be done in the court below.

[18] I am of the view that the learned Solicitor General was quite correct in her submission that the effect of a declaratory judgment is the same whether the

application is for a stay of execution of a judgment or a stay of proceedings. The **Bowen** case makes that clear and I too rely on the conclusion of P W Young QC taken from his work 'Declaratory Orders' (referred to above), as did Morrison JA in **Bowen**, that:

"The effect of the court's order is not to create rights but merely to indicate what they have always been ... Because of this, if an appeal is lodged against a declaratory order, conceptually there can be no stay of proceedings."

(Likewise there can be no stay of execution of a declaratory judgment but that is no longer an issue in this application.)

[19] Additionally, I accept and apply the principle to be extracted from the case of **Director of Public Prosecutions v Mark Thwaites et al** and agree with the submissions of the learned Solicitor General that "in the same way that the court held that the Resident Magistrate [sic] proceedings were not before it, so also the Privy Council proceedings are not before this court so as to facilitate a stay of those proceedings".

[20] Accordingly, the applicant's application for:

"A stay of all further proceedings consequent on the said judgment of the Honourable Mr Justice Batts J [sic] which the 1<sup>st</sup>, 2<sup>nd</sup> and/or 3<sup>rd</sup> Respondents/Defendants may institute in particular:

- a. (not pursued)
- b. Any further proceedings before the Privy Council considering the recommendation of the Public Service Commission concerning the dismissal of the

Appellant/Claimant pending the determination of this appeal”,

is refused, as apart from the decision of Batts J being in the nature of a declaratory judgment, there are no such proceedings before this court. There will be no order for costs, as agreed.”