[2015] JMCA App 18

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 33/2014

APPLICATION NOS 11 AND 21/2015

BETWEEN	**SAGICOR BANK JAMAICA LIMITED (FORMERLY KNOWN AS RBTT BANK JAMAICA LIMITED)**	**APPELLANT**
AND	**YP SEATON**	**1ST RESPONDENT**
AND	**EARTHCRANE HAULAGE LIMITED**	**2ND RESPONDENT**
AND	**YP SEATON & ASSOCIATES COMPANY LIMITED**	**3RD RESPONDENT**

Michael Hylton QC, Kevin Powell and Sundiata Gibbs instructed by Hylton Powell for the appellant

Mrs Pamela Benka-Coker QC and Miss Anna Gracie instructed by Rattray Patterson Rattray for the respondents

10, 11, 12 February and 24 April 2015

IN CHAMBERS

McDONALD-BISHOP JA (Ag)

Introduction

[1] These proceedings primarily involve the consideration of two different but inter-related applications. The first application was made by the appellant, Sagicor Bank

Jamaica Limited ("Sagicor"), formerly known as RBTT Bank Jamaica Limited ("RBTT"), for a stay of execution of the judgments of Sykes J granted in favour of the respondents (the "Seaton Parties") on 17 March and 24 September 2014. Emanating from that application for stay of execution was a preliminary issue that was raised for consideration by the Seaton Parties as to whether Sagicor had the requisite *locus standi* to make the application. The second application was brought by the Seaton Parties for the court to strike out or to rule as inadmissible an affidavit of Devon Rowe that was filed by Sagicor in support of its application for the stay.

[2] At the end of the consideration of the respective applications, I made the following orders:

A. On the preliminary issue as to the *locus standi* of Sagicor:

> "(1) From the date hereof, the name of the appellant shall be changed from RBTT Bank Jamaica Limited to Sagicor Bank Jamaica Limited.
>
> (2) All documents filed in the name of Sagicor Bank Jamaica Limited as appellant up to today's date are permitted to stand."

B. On the Seaton Parties' application to strike out the affidavit of Devon Rowe:

> "The respondents' application to strike out the affidavit of Devon Rowe filed on 6 February 2015 is refused."

C. On Sagicor's application for stay of execution:

> "(1) The orders of Sykes J made on 17 March 2014 and 24 September 2014 are stayed pending the determination of the appeal.

(2) Costs shall be costs in the appeal."

After making those orders, I promised to reduce my reasons for so doing in writing. This is a fulfillment of that promise.

The background

[3] The dispute between the parties that has led to these proceedings has had a long and tumultuous journey through the courts for over two decades and its resolution, from all indications, is not yet close in sight. Its sojourn in the courts commenced in 1993, being roughly 22 years ago, when Eagle Commercial Bank ("Eagle") commenced proceedings in the Supreme Court against the Seaton Parties in a claim numbered CL 1993/E083 ("the Bank's claim") in which it sought to recover money it claimed it had erroneously overpaid to their accounts. Eagle claimed recovery of the overpayments with interest and a declaration that it was lawfully entitled to debit the sum of $15,254,583.69 from accounts standing in the name of YP Seaton, the 1st respondent. Before filing the claim, Eagle had also frozen several of Mr Seaton's personal accounts.

[4] Mr Seaton, thereafter, commenced proceedings against Eagle in a subsequent claim numbered CL 1993/S252 ("the Seaton claim") in which he claimed that Eagle had wrongly frozen five foreign currency accounts standing in his name. He claimed for payment of the principal sums in those accounts with interest, damages and an account in relation to the five accounts. Mr Seaton claimed for an account on the basis that although Eagle had repaid some of the money it had frozen, he is not sure if he

had received all of it inclusive of interest. He, therefore, claimed for all the sums found due and owing to him after the taking of the account.

[5] By an order of the court the two claims were eventually consolidated. Also, before the trial of the claims commenced, RBTT (which will at times be referred to as "the Bank") was eventually substituted for Eagle as the claimant on the Bank's claim and as the defendant on the Seaton claim.

[6] After a few interlocutory applications, the trial of the consolidated claims commenced before Sykes J. By a judgment entered on 17 March 2014, Sykes J refused to grant the declarations sought on the Bank's claim that it was entitled to debit the sum of $15,254,583.69 from Mr Seaton's account and he, instead, ordered that the Bank is to repay that sum with interest. On the Seaton claim, he also entered judgment for Mr Seaton and ordered, inter alia, an account to be taken by the registrar of the Supreme Court and that the Bank is to pay to Mr Seaton any sum that was found due and owing to him by the registrar with interest. He ordered too that the sum ultimately found by the registrar to be due and owing to Mr Seaton is to be taken as final.

[7] Sykes J, after a post-judgment hearing that was conducted to consider, among other things, the question of the basis on which interest should be calculated and paid on the sums found due and owing by the registrar, ordered by the second judgment of 24 September 2014 that the interest to be paid by the Bank is to be monthly compound interest at 27.3%. He also ordered, among other things, specific disclosure

to be made by the Bank and the payment by it of indemnity costs, interests on costs as well as interim costs.

[8] Sykes J granted a stay in relation to the payment of the sum of $15,254,583.69 but did not stay the other aspects of the judgments. Consequently, the accounting exercise commenced in the Supreme Court with the Seaton Parties submitting, for the purposes of the accounting, a summary of calculation of their claim for principal and interest as being somewhere in the region of four billion dollars. This was arrived at after a computation done on the basis of compound interest at the rate that was stipulated by the learned trial judge.

[9] An appeal was subsequently filed by RBTT challenging the orders contained in the two judgments of Sykes J on numerous grounds. Sagicor later filed its application for a stay of execution of both judgments pending the hearing of the appeal with which these proceedings are concerned. It was the entry of Sagicor's name on the record for the purposes of the application for the stay that led to a dispute between the parties that had to be resolved as a preliminary issue on the hearing of the substantive application for the stay.

Preliminary issue: *locus standi* of Sagicor to apply for stay of execution

[10] With respect to the preliminary issue raised by the Seaton Parties as to the *locus standi* of Sagicor to apply for the stay of execution, I concluded that Sagicor has *locus standi* in the matter and is thus a proper party to bring the appeal against the

judgments of Sykes J and to apply for stay of execution of them.The reasons that have led me to that conclusion will now be discussed.

Reasoning

[11] Sagicor, without applying for permission to amend the name of the claimant on the Bank's claim and of the defendant on the Seaton claim from RBTT to Sagicor, filed the application to this court for a stay of execution in its name but indicating that it was formerly known as RBTT. The Seaton Parties took the point that Sagicor was without *locus standi* in the proceedings before this court and that its application should be dismissed. The Seaton Parties pointed to the history of the proceedings and noted that RBTT had ceased to exist since 2011.

[12] It would mean then, on the argument of the Seaton Parties, that the case would have proceeded in the court below since 2011 without a proper party to the claims, that is, no claimant on the Bank claim or defendant on the Seaton claim. When the Seaton Parties' contention is taken to its logical conclusion, it would mean that when Sykes J entered judgment in 2014, the party against whom judgment was entered would have no longer existed and there was no party substituted for it or added to carry on the proceedings in its stead. It follows then that there would have been no known existing judgment debtor against whom the judgments could be enforced.

[13] Despite the position taken by the Seaton Parties that RBTT no longer existed and the state of affairs that would have resulted from such a situation, the matter concerning RBTT's standing as an existing party was not conclusively settled before

judgment. Sykes J, instead, made a post–judgment order for specific disclosure upon the application of the Seaton Parties that, inter alia, sought to ascertain whether Sagicor was the proper successor of RBTT in the matter. It was that controversy that had commenced below as to Sagicor's standing in the matter that persisted up to this court. It was, therefore, necessary for the *locus standi* of Sagicor before this court to be established before any further step could be taken in the proceedings in order to treat with the issues arising on appeal.

[14] In embarking on an examination of that vexed question of Sagicor's *locus standi* in the proceedings on appeal, I formed the view that final judgment having been entered by the trial judge on the claims in question with the appellate jurisdiction now having been invoked to treat with the judgment, the Supreme Court would have been *functus officio* to determine the *locus standi* of the parties to the appeal. I concluded that this court would be the proper forum to treat with that question. I could find no legal or practical basis, and none was pointed out to me, for the matter to be sent back to the Supreme Court for that court to make a determination as to the proper parties for the purposes of the appeal. It was against that background that I undertook an examination of the question whether Sagicor should be allowed to stand as a party in the proceedings before this court.

The connection between RBTT and Sagicor

[15] The starting point in my analysis of the question was to ascertain the connection between RBTT, whose name stood on the record at the time the judgments

in question were entered, and Sagicor who is the applicant for the stay. In this regard, the evidence revealed that Eagle, the original party to the proceedings, was merged with Jamaica Citizens Bank Limited and other banks to form Union Bank of Jamaica Limited("Union Bank") as a result of the financial sector meltdown of the 1990's. The Financial Sector Adjustment Company Limited ("FINSAC") owned the majority shares of Union Bank. RBTT International later acquired from FINSAC its shares in Union Bank and started operations as RBTT Jamaica Limited. It was that acquisition that resulted in RBTT later becoming a party to the proceedings in lieu of Eagle.

[16] On 15 June 2011, RBTT changed its name to RBC Royal Bank (Jamaica) Limited ("RBC"). Although the Bank ceased to exist in the name RBTT, the records of the court were never changed to reflect the change of name to RBC. On 26 June 2014, by a further Certificate of Incorporation of Change of Name, the name RBC was changed to Sagicor. What was effected, therefore, was a series of change of names from RBTT to Sagicor. By the time RBC was changed to Sagicor, the judgment of Sykes J of 17 March 2014 had already been entered in the name of RBTT. Also, while the name of RBTT was changed to Sagicor in June 2014, the judgment of 24 September was entered in the name of RBTT and the appeal was filed in that name and not the new name Sagicor.

[17] Mr Hylton QC for Sagicor demonstrated, by reference to evidence placed before this court by the Seaton Parties, that Sagicor is, indeed, RBTT by virtue of the change of name. He pointed to the affidavit evidence of Mr Seaton, filed in these proceedings,

that exhibited the Certificates of Change of Name of RBTT to RBC and then to Sagicor. Those certificates evidencing the change of names do show, unquestionably, that Sagicor is "formerly RBTT".

[18] Learned Queen's Counsel also pointed to the application that was made in the court below by RBTT's former attorneys-at-law to substitute the name 'Sagicor' for RBTT. The application stated that:

> "[D]espite the name change, the entity formerly known as RBTT Bank Jamaica Limited, then RBC Royal Bank Jamaica Limited, remains a legal corporate entity, having the same Tax Registration Number and Company Number. This state of affairs remains with the change of name to Sagicor Bank Jamaica Limited."

[19] The affidavit evidence of Ky-Ann Taylor, legal counsel for Sagicor, filed in the proceedings has chronicled in detail the history of the change of name. These documents were all served on the Seaton Parties and so it could not at all be said that they had been taken by surprise about any of the matters relating to the change of name from RBTT to Sagicor. Therefore, the unchallenged evidence produced by Sagicor was clear that what had been effected was a change of name and nothing else. It is, therefore, established, indisputably, on clear and credible evidence that Sagicor is RBTT's new name.

Legal effect of a change of name

[20] Mr Hylton argued that on the basis of this evidence and section 17(5) of the Companies Act there would have been no need for an application to have been made

to substitute Sagicor as a party to the proceedings. The application to do so which was filed in the court below (but not pursued) was unnecessary, he said. Section 17(5) of the Companies Act provides:

> "**The change of name shall not affect any rights or obligations of the company or body, or render defective any legal proceedings by or against it, and any legal proceedings that might have been continued or commenced against it by its former name *may* be continued or commenced against it by its new name."** (Emphasis added.)

[21] The section is clear that the proceedings commenced by or against RBTT are not rendered defective by a change of name and so remain valid. Furthermore, by virtue of that section, the rights and obligations of RBTT in the proceedings still subsist despite the change of name. RBTT, therefore, remains a proper party to the claims brought either for or against it, and this is so whether it is called RBTT or by its new name Sagicor. By law, the entity is one and the same and the legal proceedings brought in its name, by and against it, remain unaffected by the change of name. It means that the proceedings may continue in its former name, RBTT or in its new name, Sagicor. The debate as to *locus standi*, in my view, is rendered unnecessary by the provisions of section 17(5).

[22] I was, therefore, satisfied by the evidence, which was within the certain knowledge of the Seaton Parties, that Sagicor is RBTT and not a separate legal entity. In other words, no new party was entering the picture and so, for that reason, the rules governing removal, addition or substitution of a party would not have been applicable in the circumstances.

[23] Indeed, the provisions of section 17(5) seem also to have rendered it unnecessary for there to have been any application to change the name in the proceedings from RBTT to Sagicor. It follows then that even though Sagicor had gone ahead and placed its name on the record stating, as it has done, that it was formerly known as RBTT, that would not be a defect in the proceedings so as to invalidate it because the same party (RBTT) is still in the proceedings but just by another name.

[24] As Mr Hylton correctly pointed out, the section clearly establishes beyond question that Sagicor is a proper party in the proceedings that were formerly being carried on in the name of RBTT. Sagicor is thus the proper appellant and is entitled to approach the court as the judgment debtor, either in its former name (RBTT) or in its name, for stay of execution of the judgment that was entered against it.

[25] I concluded that given that the name RBTT no longer exists, it would be more appropriate to put Sagicor on the record to reflect the change of name for present and future purposes. Furthermore, and even more importantly, I saw nothing that could prejudice the Seaton Parties if the documents filed in the name of Sagicor, whether as appellant or applicant, prior to the hearing, were permitted to stand or that for the purposes of the appeal, a reference to RBTT is to be taken to be, from now on, as being a reference to Sagicor.

Exercise of case management powers in permitting Sagicor to stand on record of appeal

[26] In this case, what was at the heart of the controversy giving rise to the preliminary issue was a mere matter of the name of the party to the proceedings to be used on the record (new name versus old name) rather than a substantive issue as to the legal standing of the party. The question for me was whether I could permit that amendment of a name (rather than of a party) to stand even though no formal application was made by Sagicor for the court's permission to amend.

[27] After giving thought to the question as to the impact of such an amendment on the proceedings, I allowed the record to stand and the appeal to continue in the name of Sagicor in the exercise of the case management powers conferred on me by the Court of Appeal Rules ("the CAR"). In so far as is relevant, rule 1.7(n) of the CAR empowers the court to "take any other step, give any other direction or make any other order for the purpose of managing the appeal and furthering the overriding objective."

[28] While I do admit that it might have been tidier and, perhaps, less controversial for an application to have been made for the name to be changed to Sagicor on the record, failure to do so is not fatal to the proceedings. There is no provision in the rules of court that such application to change a name had to be formally made. If one looks at rule 19.3(1) of the CPR (which does not apply to this court or in these circumstances in any event but is relevant simply for the purpose of parity of reasoning) it is provided that the court may add, substitute or remove a party **on or**

without an application. It follows then that if the court can make such orders in relation to a party without an application, then it seems plausible to conclude that it may do so where what is in question is a mere change or correction of a name of an existing party to the proceedings.

[29] The learned authors of Blackstone's Civil Practice 2004 usefully noted at paragraph 1.12 that, "where there are no express words in the CPR dealing with a situation, the court is bound to consider which interpretation best reflects the overriding objective when construing the rules (**Totty v Snowden** [2001] EWCA Civ 1415, [2002] 1 WLR 1384 at [34]". Within this context, they also pointed to Lord Woolf's comments in the Final Report, at paragraphs 10-11 of chapter 20, where he stated, in part:

> "Civil procedure involves more judgment and knowledge than the rules can directly express. In this respect, rules of court are not like an instruction manual for operating a piece of machinery. Ultimately their purpose is to guide the court and the litigants towards a just resolution of the case. Although the rules can offer detailed directions for the technical steps to be taken, the effectiveness of those steps depends upon the spirit in which they are carried out. That in turn depends on an understanding of the fundamental purpose of the rules and of the underlying system of procedure.
>
> In order to identify that purpose at the outset, I have placed at the very beginning of the rules a statement of their overriding objective."

[30] The overriding objective, which must guide this court in the exercise of its case management powers by virtue of the CAR, is to enable the court to deal with cases

justly when exercising any powers under the rules or when interpreting any rule. Parties to litigation are also required to assist the court in achieving the overriding objective. Part of the overriding objective is to deal with the case expeditiously, fairly and in a manner geared at saving expense while at the same time allotting to it an appropriate share of the court's resources.

[31] This case has been in the judicial system for almost a quarter of a century and it does seem to me that the time for technical points to be raised unnecessarily is long past. This issue as to whether Sagicor is RBTT or whether the appeal should be in the name Sagicor or RBTT is, in my view, one that should waste no more of the court's time, energy and limited resources. This is because the change of name does not and cannot affect the validity of the proceedings in any way in the light of section 17(5).

[32] In deciding whether to allow the record to stand with the name Sagicor replacing the name RBTT as appellant, I also adopted the views of Bowen LJ expressed in **Cropper v Smith** (1883) 26 Ch D 700,which stated, in part:

> "It is a well established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights…It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case as a matter of right."

[33] I concluded that to allow the name 'Sagicor' to stand on the record instead of the name 'RBTT' would not change the issues for resolution between the parties in the

substantive claims that are on appeal. Furthermore, there is absolutely no injustice that could be suffered by the Seaton Parties by a name change on the record because they were fully aware that RBTT is now Sagicor. Indeed, it could only enure to their benefit because now there can be no uncertainty as to who the judgment debtor is for the purposes of the execution and enforcement of the judgments granted in their favour.

[34] Having taken all the circumstances into account within the context of the applicable law and rules of procedure, I concluded that, as a matter of law, Sagicor, being RBTT by a new name, has a right to apply for a stay of execution pending the determination of the appeal. For the foregoing reasons, Sagicor's application for the stay was allowed to proceed and the necessary orders made to regularize Sagicor's standing on the record in keeping with the letter and spirit of section 17(5) as well as the overriding objective.

The Seaton Parties' application to strike out affidavit of Devon Rowe

[35] The Seaton Parties filed a notice of application for court orders for the court to strike out or not to admit the affidavit of Devon Rowe that was filed by Sagicor in support of the application for the stay of execution.That application had to be disposed of prior to the consideration of Sagicor's application for the stay. After a consideration of the application and the submissions of counsel on both sides, I found that there was no basis in law to strike out the affidavit. The reasons for this conclusion are detailed below.

Reasoning

[36] Devon Rowe is the Financial Secretary of Jamaica and his affidavit was filed as a result of the interest of the Government of Jamaica in the enforcement of the judgment. This interest of the Government arises from the Share Sale Agreement entered into between FINSAC and RBTT International and RBTT Financial Holdings Limited at the time RBTT took over Union Bank. By this agreement, a full indemnity was provided to RBTT from FINSAC for all losses suffered and costs reasonably incurred by RBTT relating to any litigation commenced against Union Bank prior to the acquisition by RBTT of the shares. In short, by virtue of this indemnity, the Government is, ultimately, the party to satisfy the judgment debt awarded in favour of the Seaton Parties against Sagicor.

[37] Mr Rowe's affidavit was aimed at showing the effect that the enforcement of the judgment would have on the Government and the country, as a whole, if the execution of the judgment is not stayed and Sagicor is ordered to pay the sum being claimed by the Seaton Parties before the appeal is determined.

[38] The central arguments of the Seaton Parties, urged vociferously through Mrs Benka-Coker QC on their behalf, were, inter alia, that the purpose of the affidavit was to "heap pressure" on the court in order to deny Mr Seaton of the fruits of his judgment and that the "heavy hand of the Financial Secretary has no relevance at all to the application". Learned Queen's Counsel contended further that "it is for Sagicor to battle with the Government over its indemnity and it is wholly irrelevant to the

Seaton Parties and to the Court in the consideration of the application by Sagicor to stay execution of the judgment.

[39] Mr Hylton, on the other hand, sought to defend the use of the affidavit on the grounds of relevance. He pointed to, among other things, the existence of the indemnity in favour of Sagicor as well as to the fact that Mr Seaton, himself, had written to the Minister of Finance and the Governor of the Bank of Jamaica concerning the existence of the judgment debt. He maintained that Mr Seaton, by so doing, had acknowledged the Government's interest in the proceedings.

[40] The evidence, in fact, revealed that Mr Seaton had copied to the Minister and the Governor of the Bank of Jamaica a letter he had written to Sagicor on 24 March 2014, in which he stated:

> "It is because of RBTT/RBC's failure to regularize the position in the litigation that I feel that it is imperative to bring this matter personally to your attention and also to the attention both of the Bank of Jamaica and the Minister of Finance so that the sale of RBC Royal Bank (Jamaica) Limited to Sagicor proceeds on the basis of full disclosure of the existence and state of these current proceedings and the liability of RBTT or its successor bank to whom its liabilities have been assigned, to satisfy the judgment in their favour given on 17 March 2014.
>
> May I please hear from you as a matter of urgency both to acknowledge receipt of this letter and for any proposal the banks have for the satisfaction of the judgment given in the Y.P. Seaton parties' favour."

[41] Mr Seaton also exhibited for the purposes of these proceedings correspondence between Sagicor and his then attorneys-at-law which indicated, among other things,

that "in line with the agreement, FINSAC Limited will continue to bear all liability" in respect of the claims involving the Seaton Parties.

[42] It is plain and obvious on all the evidence that it is the Government who will, ultimately, be liable for the satisfaction of the judgment debt arising from these claims. Therefore, the Government, even though not a party to the claim, is, nevertheless an interested third party who stands to be directly affected by the enforcement of the judgment. The Seaton Parties had recognized and acknowledged that fact when they applied for and was granted an order by Sykes J for specific disclosure of the terms of the indemnity.

[43] The fact that that the Government had seen it fit to give evidence on behalf of Sagicor as to the effect the enforcement of the judgment could have does not make it an improper intermeddler in these proceedings. Mr Rowe acted as a mere witness in the proceedings and Sagicor, in making its application, was at liberty to obtain relevant evidence from whomever it considered appropriate. There would, therefore, have had to be a legitimate basis for me to strike out the affidavit of Mr Rowe and/or to rule it as being inadmissible.

[44] The general principle, as a matter of substantive law, is that all relevant evidence is admissible subject to exclusionary rules such as hearsay. There is also a residuary exclusionary discretion in the court, both at common law and by statute, to exclude evidence where, in the opinion of the court, the prejudicial effect outweighs the probative value.

[45] Procedurally, Part 30 of the CPR, which is incorporated by reference in the CAR by virtue of rule 1.7, provides for the striking out of evidence contained in an affidavit. Rule 30.3 makes provision as to what the contents of an affidavit should be. It states in rule 30.3(3):

> "(3) The court may order that any scandalous, irrelevant or otherwise oppressive matter may be struck from an affidavit."

[46] I found that the evidence of Mr Rowe was relevant and that finding of relevance operated to satisfy the primary test for the admissibility of the evidence. In the end, I also concluded that the affidavit in question was not shown to have contained anything that could be regarded, *prima facie,* as being scandalous, oppressive or prejudicial. There was thus nothing that would justify striking it out or ruling that it was inadmissible.

[47] I saw the ultimate question for consideration in relation to this affidavit as being one of weight rather than of admissibility. Accordingly, I ruled that the affidavit was admissible subject to the weight I would accord to its contents after a full hearing of the application. The application to strike out the affidavit or, in the alternative, to rule it as being inadmissible was, therefore, refused.

Sagicor's application for stay of execution

[48] Sagicor sought the stay of execution of the judgments on several bases, which were well-documented and supported by the affidavits of Ky-Ann Taylor and Devon

Rowe. The Seaton Parties, on the other hand, vigorously opposed the application by advancing evidence as well as rather detailed submissions. All the evidence and submissions of the parties have been equally considered and treated with the same degree of respect.

Reasoning

[49] It has been noted by the learned writers of Blackstone's Civil Practice 2004 at paragraph 71.38 that for many years the courts have acted on the principle stated in **Atkins v Great Western Railway** (1886) 2 TLR 400 that a stay may be granted where the appellant produces written evidence showing that if the judgment were to be paid, there would be no reasonable prospect of getting it back if the appeal were to succeed. Staughton LJ in **Linotype-Hell Finance Ltd v Baker** [1993] 1 WLR 321, however, stated that that test was too stringentand that the stay could be granted if the appellant would face ruin without a stay provided the appeal had some prospect of success.

[50] While the foregoing considerations may be relevant in determining the question whether to grant a stay, none of them is determinative. It is now accepted, on later authorities, that whether the court should exercise its discretion to grant a stay of execution of a judgment pending the hearing of an appeal against the judgment depends upon all the circumstances of the case, but the essential factor is the risk of injustice (see **Hammond Suddard Solicitors v Agrichem International Holdings**[2001] All ER (D) 258). The essential question is according to the

authorities, whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay.

[51] Some material questions identified by the authorities as having a bearing on this question of risk of injustice are as follows:

(a) If a stay is refused what are the risks of the appeal being stifled?

(b) If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment?

(c) 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?

See **Hammond Suddard Solicitors v Agrichem International Holdings**; **Green v Wynlee Trading Ltd and Others** [2010] JMCA App 3 and Blackstone's Civil Practice 2004, paragraph 71.38.

[52] In **Green v Wynlee Trading**, it was pointed out by Morrison JA, after citing the dictum of Harrison JA in **Watersports Enterprises v Jamaica Grande Ltd and Others** SCCA No 110/2008, delivered 4 February 2009, that it is a two-step process that should be employed by the court in determining whether to grant a stay of execution. The first phase of the process is to determine whether the appeal is one "with some prospect of success" and the second is to consider "whether the case is a fit one for the granting of a stay."

Whether appeal has some prospect of success

[53] In determining whether the appeal has some prospect of success, or is not "completely unarguable" (to borrow the words of Morrison JA in **Green v Wynlee Trading**), I have accepted that I ought not to embark upon an enquiry as one would in treating with the substantive appeal. I also endorse the approach of the court in **William Clarke v Gwenetta Clarke** [2012] JMCA App 2, as stated by Phillips JA, that "I am not required to give any view on the merits of the different positions taken by the parties on the facts or on the law, as the issues between the parties will have to be decided if and when the appeal is heard…" Therefore, I have not delved into the various issues that have arisen for contemplation on this appeal beyond what was necessary for me to demonstrate the reasoning behind my decision to grant the stay.

[54] Sagicor has challenged over 55 findings of mixed law and facts of the learned trial judge in 25 wide - ranging grounds of appeal. I think it sufficient to simply state that I have read in depth the written judgments of the learned trial judge and have scrutinized the terms of the orders made against the background of the grounds of appeal being pursued.

[55] One of the main complaints of Sagicor, which I find as going to the heart of the accounting process and which would touch and concern the quantum of the final sum to be paid, which is not yet determined, is whether compound interest can be awarded to a party who had not pleaded or proved it. In this case, Mr Seaton had neither

pleaded nor proved a claim for compound interest and had proved no actual interest loss.

[56] Sykes J saw it fit, nevertheless, to award compound interest against the authoritative pronouncements of the House of Lords in **Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners and Another** [2009] 1 AC 561 that established that if a claimant wishes to recover compound interest, he must plead and prove it. In doing so, he indicated that he adopted the practice declared by the Privy Council in **Financial Institutions Services Ltd v Negril Holdings Ltd and Another** [2004] UKPC 40 on the issue of compound interest.

[57] This approach of the learned judge is being challenged by Sagicor as being wrong in law on several planks which I do not consider necessary to detail at this point. This is because the learned judge, himself, in recognizing that he was moving away from an established line of authority on the issue, expressed the view that a stay of execution of this aspect of his judgment ought to have been granted. This is what he stated at paragraphs [31] and [32] of his judgment, delivered 24 September 2014:

> "[31] In this case, Mr Seaton has submitted, through his counsel, that the average interest rate over the period is 27.30%. Applying this rate of interest and compounding the interest in the manner suggested by Negril Holdings Limited, the calculation yields a sum of JA$5,622,084,739.33. By any measure this is a staggering sum.

> [32] **This shows the need for there to be a stay so that this issue can be fully addressed by the Court of Appeal.** The question of when compound interest should be applied is a matter of great concern, particularly to those citizens who have been caught up in the financial sector crisis of the 1990's..." (Emphasis mine)

[58] The judge himself recognised the prudence of having the matter addressed by the Court of Appeal before the judgment is executed. His failure to ultimately order a complete stay is unfathomable in the light of his pronouncements unless the omission was a matter of sheer inadvertence on his part.

[59] The accounting procedure to be undertaken by the registrar would have to be conducted by reference to the learned judge's orders as to the application of compound interest in the computation of the final judgment debt. If the stay is not granted, then, Mr Seaton would have to be paid sums based on compound interest amounting to close to four billion dollars which could well be set aside by this court on appeal if the judge is found to have erred. Therefore, if Sagicor succeeds on this ground, it would have a profound impact on the quantum of the judgment sum to be recovered, even if the Seaton Parties were to succeed otherwise.

[60] Sagicor seems to have an arguable ground of appeal with some realistic prospect of success in relation to the award of compound interest. The views expressed by the learned trial judge that this aspect of his judgment should be stayed pending the appeal does accord with my own that this matter as to the award of

compound interest in a case where it was neither pleaded nor proved should be fully addressed and settled by this court.

[61] Sagicor also raised, as another ground of appeal, that the learned trial judge had awarded the same sum of $15,254.583.69 twice. It is, indeed, apparent on the face of the judgment that the learned judge did make an order on the Bank's claim that Mr Seaton should be repaid the sum of $15,254.583.69 with interest. The complaint of Sagicor is that on that claim, the Bank had sought declaratory relief and Mr Seaton had filed no counterclaim for the sum. Mangatal J (as she then was) had previously decided in a judgment dated 10 November 2009 that the Seaton Parties, having not counter-claimed for that sum, could not recover it on that claim. Notwithstanding this decision, Sykes J ordered the said sum to be repaid to the Seaton Parties on the Bank's claim. The ground of appeal as a result of this action is that Sykes J had erred by ignoring the decision of a judge of concurrent jurisdiction and from which there was no appeal by the Seaton Parties. Sykes J has stayed the judgment in relation to that sum based on his recognition that he had ruled inconsistently with the decision of Mangatal J.

[62] On the Seaton claim, Sykes J had also ordered that the sum of $15,254,583.69 is to be repaid to Mr Seaton. One of the grounds of appeal arising from this order is that there was no pleading in Mr Seaton's statement of case concerning that amount and it was in no way sought by Mr Seaton. The issues as to whether these sums were

properly claimed and properly awarded and whether there was duplication in the judgment are questions that do rise for investigation on the appeal.

[63] I must point out too, as a related matter, that there seems to be an overlap in the first judgment of 17 March 2014 between the accounts said to have been frozen (which form the subject of the accounting procedure which is pending) and the accounts from which the learned trial judge found that sums of money making up a part of the $15,254,583.69 were taken.

[64] These are issues that, inevitably, touch and concern what, if any, should be the final judgment in favour of the Seaton Parties. Any sum worked out by the registrar after the accounting process, if it is not halted, would be placed in a precarious position in the light of these questions as to the propriety and accuracy of the learned trial judge's awards of both principal and interest on the two claims.

[65] On my perusal of the reasoning of the learned judge against the background of the grounds of appeal, the arguments that there may be duplication in the awards led me to conclude that Sagicor has an arguable case on appeal with some prospect of success.

[66] There are several other grounds on which the appeal is based, which include a challenge to the awards of indemnity costs, interest on costs and interim payment of costs pending the appeal. As a matter of expediency, I will simply state that I have looked at them all and in examining them against the background of the judgments

delivered by the learned judge, I cannot at all say that that they are completely unarguable and/or without any realistic prospect of success.

[67] It is clear that the learned judge had traversed hitherto uncharted waters in relation to several matters of fundamental importance to the resolution of the dispute between the parties. It would be hard for anyone to deny that the judgments being appealed against do bear some unconventional features that clearly warrant mature considerations on appeal. The learned trial judge himself had acknowledged that he was not following the orthodox line in a number of areas.

[68] Having carried out an evaluation of the entire circumstances of the case, not least of which is the claim of the Seaton Parties to what they believe they are entitled to (being billions of dollars), I was satisfied in all the circumstances that Sagicor had put forward an arguable case with a realistic prospect of success on matters that could affect, in a fundamental way, the final judgment of the court below. I found that it had surmounted the first hurdle for a stay of execution to be granted.

Is the case fit for the grant of a stay?

[69] The second stage of the test is that Sagicor must satisfy the court that the case is a fit one for the granting of a stay. Sagicor contended that in the circumstances of this case, there was a real risk of injustice being done to it on three bases if the stay was not granted. Those bases were identified as follows:

(a) irreparable damage to it;

(b) significant and possibly irreparable damage to the public; and

(c) that the sums if paid will not be recovered if the appeal succeeds.

Damage to the bank and the public

[70] In seeking to establish that there is a risk of injustice that could result from irreparable damage to it, Sagicor relied on the evidence of Ms Ky-Ann Taylor in which she indicated that a public announcement of a four billion dollar judgment could cause the bank irreparable reputational damage as Mr Seaton had made it clear that he would seek to enforce the judgment if there is no stay. Sagicor pointed out that possible irreparable damage could be caused to the public if the judgment is enforced before the appeal.

[71] I am not moved to accept that there is enough evidence on what is presented for me to form a view that the payment of the sum in question would cause irreparable reputational damage to Sagicor. I have no idea of Sagicor's financial standing to say the sum would cause it irreparable reputational harm or financial ruin, especially when there is an indemnity in its favour. What I do accept is that the sum is, "a staggering" sum as the learned trial judge himself described it. There is also a real and present risk, given the bureaucratic procedures of the Government, as described by Mr Rowe in his affidavit, that the Government would not be able to indemnify Sagicor within such a short time so as to stave off any effect the withdrawal of approximately four billion dollars from its coffers could have on its resources. I think it safe to conclude that

Sagicor could well be adversely affected in a material way if the sum being claimed is paid before the appeal is disposed of.

[72] Also, the ability of the Government to quickly respond to secure the sum to indemnify Sagicor before the appeal is heard, and the repercussions that could well have on the fiscal policies of the Government, as detailed by Mr Rowe, were taken into account as relevant considerations. They were seen as relevant considerations because the Government, like Sagicor, has a legitimate interest in the enforcement of any judgment debt that would be due and payable to the Seaton Parties.

[73] I have noted, in considering the evidence of Mr Rowe, that while the effect of the enforcement of the judgment on the Government is a relevant consideration, it cannot be used to override the rights and interests of a judgment creditor in securing his judgment debt that is legitimately due to him. The indemnity arrangement is between Sagicor and the Government and so it ought not to be used to obstruct the Seaton Parties' in securing the fruits of their judgment. The point is, however, that we are not at the stage where we can safely say, given the challenge to the judgment on appeal and the state of the judgment itself at this point (being one that is not yet finalized as to the final sum) that the Seaton Parties are conclusively entitled to the almost four billion dollars that they have submitted in their claim to the registrar.Their claim for that sum is, at present, in a tenuous position given the numerous challenges to the judgment with some realistic prospect of success on appeal.

[74] In the light of such state of affairs, it would be grossly impracticable for the Government to be placed in a position to have to satisfy an indemnity to the tune of four billion dollars, which, in the end, could turn out to be unwarranted. All the adverse effects the arrangement to satisfy the judgment could have on the budgetary and fiscal affairs of Government, and the country, on a whole, could well be far-reaching and irreversible, if the appeal succeeds. This is a risk that was weighed in the equation in considering this interlocutory application, even though it was not taken as an overriding one.

Whether the sums, if paid, can be recovered if the appeal succeeds

[75] Even further and more importantly, the question of the recovery of the sums that would have been paid out under the impugned judgment, if the stay were not granted and the appeal succeeded, arose for serious contemplation. This question is closely related to the assertions of Sagicor that significant and irreparable damage to it and possibly to the public could be caused if the judgment is enforced before the appeal is heard. The risk that the sum might not be recovered or be easily recovered if paid out to the Seaton Parties or any of them was a critical question in my deliberations that I could not treat lightly.

[76] Whilst the stringent test for the grant of a stay might have changed, Sagicor, nevertheless, had made an effort to put material before me to demonstrate that there is a real risk that if the sum being claimed is paid over to the Seaton Parties, it might not be recovered. It placed before me a newspaper article in which it was reported

that the Jamaica Mortgage Bank had sued two companies controlled by Mr Seaton, one of which is a party to these proceedings, to recover over a billion dollars on an outstanding loan that the companies have failed to repay despite demands for them to do so.

[77] I considered the evidence that was placed before me by Sagicor but attached no weight to it because the highest that it could have been taken to mean, within the context of the instant proceedings, is simply that legal action, relating to the financial position of one of the Seaton Parties to pay a debt, is pending. I have not acted upon it to conclude that there is truth in the assertion that the companies owed that sum and so, by extension, the Seaton Parties are, therefore, not in a position to repay any sum that could be paid out to them by Sagicor. I was not able to arrive at such a position in the absence of an admission of the debt on that claim or it having been established that there is no defence to that claim with a real prospect of success. That evidence, therefore, did not assist Sagicor in advancing its case.

[78] I will simply say, however, that there was nothing that was placed before me to produce an appreciable measure of ease in my mind, or to dispel my concern, that if the judgment were not stayed and the appeal succeeded, that such a large sum as being claimed by the Seaton parties could be recovered, or be easily recovered. It would be highly risky, in my view, to place so much money in the hands of anyone before it is established beyond dispute that such a person is entitled to receive it.

[79] I formed the view that to allow the portion of the judgment not stayed by Sykes J to proceed to enforcement at this time could be more prejudicial to Sagicor than it would be to the Seaton Parties as there is nothing to say that if Sagicor fails on the appeal, it will not be able to satisfy the judgment debt. There is, however, nothing to say that the Seaton Parties are in a position to repay almost four billion dollars, if the appeal should succeed. So, if the stay is not granted and such a huge sum is paid out, Sagicor's appeal could be stifled or any success on the appeal could be rendered nugatory. These considerations weighed heavily in favour of Sagicor's contention that there was a real risk of injustice being caused to it if the stay were not granted.

[80] Morrison JA, in speaking to the exercise of a judge's discretion in treating with an application for stay of execution pending appeal, usefully noted in **Channus Block and Marl Quarry Limited v Curlon Orlando Lawrence** [2013] JMCA App 16 at paragraph [10]:

> "[10] It is, in my view, essentially a balancing exercise, in which the courts seek to recognise the right of a successful claimant to collect his judgment, while at the same time giving effect to the important consideration that an appellant with some prospect of success on appeal should not have his appeal rendered nugatory by the refusal of a stay."

[81] Mrs Benka - Coker forcefully argued (quite rightly, I would add) that the Seaton Parties ought not to be deprived of the fruits of their judgment by the grant of a stay. I have seriously taken into consideration their absolute right to enjoy the fruits of their judgment. I am quite mindful too of the time it is taking for the matter to be resolved

and I am quite sensitive to the pressing need and the rights of the Seaton parties to have finality brought to the proceedings.

[82] It has not escaped attention that the learned trial judge had categorically ordered that the registrar's findings as to the final sum payable on the judgments would be final and there was no express provision for liberty to apply with respect to any matter arising from the process. In effect, he had left it for the registrar to determine the final judgment sum without any further reference to him. The procedure specified in the CPR that deals with claims for an account (which the Seaton claim was) was never followed. The directions for taking of the account was never applied for and made at the case management conference (or first hearing) as provided for in rule 41.2(1) of the CPR. Instead, it was made as part of the final judgment with no provision for reference back to the learned trial judge. This means that any challenge as to the accuracy in computation and/or propriety of the conduct of the accounting process by the registrar would have to be the subject of an appeal.

[83] It follows, then, that if the accounting is allowed to proceed to finality, the registrar would have to conduct the accounting process in accordance with the impugned orders of the learned trial judge and so Sagicor would still be aggrieved at the end of the process. It means that, in any event, the matter would still have to be resolved on appeal.

[84] In the light of such circumstances, I concluded that it would be highly inconvenient and, rather, imprudent to allow the process that will, inevitably, be

challenged in the end to proceed to completion. It is my belief that halting it at this juncture would save time, costs, and expense and would also, in the end, serve to ease the burden on the already overburdened and limited resources of the courts.

[85] Having examined the application against the background of all the circumstances and the relevant principles of law applicable to its consideration, I concluded that on a balance of convenience and in the interests of justice, the orders of Sykes J should be stayed pending the appeal.

[86] After a consideration as to whether it was an appropriate case in which to order the stay on terms, I found that no proper basis existed for me to make such an order in light of all the circumstances. The stay was, therefore, granted unconditionally.