JAMAICA

IN THE COURT OF APPEAL

IN CHAMBERS

BEFORE: The Hon. Mr. Justice Swaby, J.A.

B E T W E E N BEVERLEY SHIELDS - DEFENDANT/APPELLANT

A N D JENNIFER J. GRAHAM - PLAINTIFF/RESPONDENT

Mr. Lincoln Eatmon of Messrs Dunn, Cox & Orrett for the Appellant.

Mr. Paul Levy of Messrs Livingston, Alexander & Levy for the Respondent.

July 2 and 4, 1974

SWABY, J.A.:

On May 15, 1974 McCarthy, J. (Ag.) awarded the sum of $18,158:50 to the respondent on her claim for negligence against the appellant. The record discloses that on the same day the trial judge ordered a stay of execution of the judgment for six weeks to enable the appellant to file her appeal; and that Notice and Grounds of appeal against the judgment were filed on June 12, 1974.

On June 25, 1974 the appellant caused a summons to be issued to the respondent to attend a judge in chambers at the Court of Appeal on July 2, 1974 at the hearing of an application by the appellant that the stay of execution herein be extended and continued until the hearing and disposal of the appeal herein or until further order of this Court. The summons came on for hearing before me on July 2, 1974 when the arguments by the parties were concluded and the matter adjourned to today for the Court's decision.

Preliminary objection was taken by counsel for the respondent to the hearing of the application before this Court on the ground that the application should in the first instance be made to the trial judge in compliance with Rules 21(1) and 22(4) of the Court of Appeal Rules 1962. In support of this contention the case of Linda Hill et al v. Wallen decided on June 5, 1973 was cited. In that case Graham-Perkins, J.A. held, following the decision in Cropper v Smith (1883) 24 Ch.D. 305, that the effect of Rules 21(1) and 22(4) is that an

application for a stay of execution or of proceedings under the decision of the court below should be made in the first instance to the court below and if that court refused such application a similar application may thereafter be made to the Court of Appeal. Counsel for the respondent submitted that as the trial judge had ordered a stay of execution for six weeks to allow the appellant to file and serve notice and grounds of appeal and this had been done it could not be argued that the trial judge had refused the application. If, therefore, the appellant wished to apply for a further stay of execution he should first apply to the trial judge and it was only if he refused that application that a similar application could properly be made to the Court of Appeal.

Counsel for the appellant on the other hand urged that the proper construction to be placed on Rules 21(1) and 22(4) is that the appellant had only to make the initial (i.e. in the first instance) application for stay of execution to the trial judge, which had been done and the application granted, and that any further application for stay of execution could only properly be made to the Court of Appeal, as there was an appeal entered in that Court. Counsel for the appellant also submitted that counsel for the respondent had filed an affidavit relating to the application to the Court of Appeal, that the respondent must therefore be taken as having submitted to the jurisdiction of that Court, and could not now be heard to say that the application to the Court of Appeal was not in order. He cited no authority in support of his submissions.

I have perused the reasoning for the decision arrived at by Graham-Perkins, J.A. in Hill et al v Wallen and the cases therein cited and I agree with his decision and those in the case of Cropper v Smith. I hold that the construction of the Rules in question contended for by the appellant's counsel is incorrect. Rule 22(4) contemplates that at the time the application for stay of execution is made there should be in existence a pending appeal. In the absence of a pending appeal the application for a stay of execution for six weeks to enable the appellant to file her appeal made to the trial judge in this case was invoking the inherent jurisdiction of the Court below, or statutory powers, not being those under the Court of Appeal Rules, 1962.

As to the inherent jurisdiction of the trial Court - see Halsbury's Laws of England, 3rd Edition, Vol.16 under the heading Sect. 10. Stay of Execution:-

> "49. Stay of execution ..... it (i.e., the Court) has an inherent jurisdiction over all judgments or orders which it has made, under which it can stay execution in all cases - Poline v Gray, Sturla v Freccia (1879), 12 Ch.D. 438 either for a definite or unlimited period - see Marine and General Mutual Life Assurance Society v Feltwell Fen Second District Drainage Board, (1945) K.B. 394."

Now that there is an appeal pending an application for stay of execution (or further stay of execution) may be made either to the Court below or to the Court of Appeal under Rule 21(1), and Rule 22(4) provides that where this is done, such application shall be made in the first instance to the Court below.

In the result the preliminary objection is upheld; the application is refused with costs to the respondent to be taxed or agreed.