

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2024CV0004

APPLICATION NO COA2024APP00006

BETWEEN	SIGNTEX LIMITED	APPLICANT
AND	DEAN MARTIN	RESPONDENT

Lemar Neale instructed by NEA | Lex for the applicant

Sean Kinghorn instructed by Kinghorn & Kinghorn for the respondent

7 and 17 May 2024

Civil procedure – Application for stay of execution – Whether *ex parte* stay of execution should be continued – Whether appeal has merit – Balance of injustice

IN CHAMBERS

MCDONALD-BISHOP JA

[1] This is an application by Signtex Limited ('Signtex'), the appellant, for a stay of execution of the judgment of Palmer-Hamilton J ('the learned judge') handed down in the Supreme Court on 30 November 2023. The learned judge made awards of general and special damages in favour of the respondent, Dean Martin ('Mr Martin'), and ordered costs against Signtex. The application for a stay was granted *ex parte* by Shelly-Williams JA (Ag) on 12 February 2024 and set for *inter partes* hearing on 7 May 2024 for the court to determine whether the *ex parte* stay of execution ('the *ex parte* stay') should be continued or discharged.

[2] On 7 May 2024, the *inter partes* hearing was conducted before me. After considering the application for the stay of execution, the evidence filed by the parties in

support of and in opposition to the application, and the submissions of counsel for the parties, I made the following orders:

- “ 1. The stay of execution granted by Shelly-Williams JA (Ag) on 12 February 2024 is extended until the determination of the appeal by Signtex Limited against the judgment of Palmer-Hamilton J dated 30 November 2023, on condition that Signtex Limited, on or before 31 May 2024, pays the sum of \$2,500,000.00 into an interest bearing account in the joint names of the attorneys-at-law for both parties. Failing such a deposit, Signtex shall pay the sum into court by the said date.
2. Costs of the application shall be costs in the appeal.”

On that date, I promised to give written reasons for the decision at a later date. I do so now in fulfilment of that promise.

[3] The relevant background to the application is as follows. Mr Martin was an employee of Signtex from 1998 until October 2014, when he was made medically redundant. In 2018, he filed a claim against Signtex in the Supreme Court seeking damages for negligence, breach of the Occupier’s Liability Act, and breach of contract. Mr Martin claimed that due to Signtex’s negligence and unsafe operation of its business premises, he was exposed to noxious, dangerous, and harmful chemicals used in Signtex’s operations and developed serious respiratory ailments as a result. Signtex filed a defence by which it denied liability for Mr Martin’s injuries. Signtex raised the defence of contributory negligence and averred that Mr Martin’s injuries were caused wholly or in part by his negligence.

[4] Having considered the evidence and applicable law, the learned judge concluded that Mr Martin had proved his claim against Signtex for negligence and liability under the Occupiers’ Liability Act, on a balance of probabilities. The learned judge found that Signtex, as Mr Martin’s employer, owed him a duty of care both under the common law tort of negligence and under the Occupiers’ Liability Act and that the duty of care was breached when Signtex failed to provide Mr Martin with a reasonably safe place and system of work, and by exposing him to noxious, dangerous and harmful chemicals.

Based on the medical and other evidence relied on at trial, the learned judge concluded that Sigtex's breach of duty was the cause of Mr Martin's injuries. The learned judge also rejected Sigtex's defence that Mr Martin was contributorily negligent. She concluded that there was no evidence before her to show that Mr Martin contributed to the cause of the injuries he suffered while he worked at Sigtex. The learned judge found that the injuries suffered by Mr Martin, for which Sigtex was liable, were (i) chronic sinusitis secondary to prolonged exposure to volatile hydrocarbons; (ii) restrictive pulmonary disease; and (iii) asthma secondary to prolonged exposure to volatile hydrocarbons.

[5] Based on her findings, the learned judge entered judgment in favour of Mr Martin, assessed the damages due to him, and awarded him special damages in the sum of \$145,473.38 with interest at a rate of 3% per annum from 28 October 2014 to 30 November 2023, general damages in the sum of \$8,000,000.00, with interest at a rate of 3% per annum from 27 February to 30 November 2018 and costs.

The grounds of the application for a stay

[6] Having filed (and subsequently amended) its notice and grounds of appeal, Sigtex applied for a stay of execution of the learned judge's orders, pending the determination of its appeal. The notice of application, read together with the affidavits filed in support, revealed the following grounds upon which the application was made:

- (1) Sigtex would suffer irreparable harm and loss if the stay of execution was refused because payment of the judgment sum would have severe adverse financial impacts on Sigtex and imperil its existence and validity;
- (2) If the judgment sum is paid to Mr Martin and Sigtex is successful in its appeal, it is likely that Sigtex will not be able to recover the said judgment sum from Mr Martin because he is an impecunious litigant;

- (3) The interest and administration of justice would not be compromised if a stay is granted; and
- (4) Sigtex has a real prospect of success in its appeal against the learned judge's judgment.

Discussion

[7] Rule 2.10(1)(b) of the Court of Appeal Rules, 2002 grants a single judge of this court the power to grant a stay of execution of orders made in the court below. The grant of a stay of execution is a discretionary remedy (see **Channus Block and Marl Quarry Limited v Curlon Orlando Lawrence** [2013] JMCA App 16 at para. [10]). The principles surrounding the exercise of the court's jurisdiction to grant a stay of execution are now well-settled and have been consistently applied in this court. As the cases demonstrate, this court is required to consider the following two questions when considering whether to grant a stay of execution:

- (i) whether the applicant's appeal has some merit; and
- (ii) whether the grant of a stay is the order that is likely to produce less injustice between the parties.

[8] The same considerations would apply regarding the question whether the interim stay of execution granted by Shelly-Williams JA (Ag) should continue having heard submissions from both sides. Accordingly, I turn now to assess the first question, which is whether the applicant's appeal has some merit.

The merits of the appeal

[9] Sigtex's appeal against the learned judge's judgment rests on seven grounds of appeal, and 15 sub-grounds of appeal. The grounds and sub-grounds challenge three broad aspects of the judge's judgment, namely, the factual findings made by the learned judge on which she grounded her conclusion that Sigtex was liable for Mr Martin's injuries in negligence and under the Occupier's Liability Act, the learned judge's rejection

of Sigtex's defence of contributory negligence, and the general damages awarded to Mr Martin. There is no freestanding challenge by Sigtex to the learned judge's order for special damages. However, it is obvious that if the appeal is allowed in relation to Sigtex's liability, the order of special damages would have to be disturbed, of necessity. Therefore, Sigtex's appeal challenges the learned judge's judgment, in its entirety.

[10] In evaluating the merits of the appeal, I am mindful that, at this stage, I am not required to conduct a detailed assessment or make detailed findings on the strength of Sigtex's grounds of appeal (see **William Clarke v Gwenetta Clarke** [2012] JMCA App 2 at para. [30]). Such an assessment is properly reserved for the determination of the appeal, at which stage the parties' respective positions would have been fully ventilated before the court. I am only required to determine whether Sigtex's appeal has an arguable appeal with some merit as opposed to being "completely unarguable" (see **Watersports Enterprises Ltd v Jamaica Grande Ltd and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 110/2008, judgment delivered 4 February 2009, at para. 8 and **Calvin Green v Wynlee Trading Ltd and others** [2010] JMCA App 3 at para. [15]).

[11] I am also mindful that there is a high threshold for appellate interference with findings of fact and awards of damages made in the court below. Thus, this court will only interfere with such findings of fact that are palpably wrong (see **Watt (or Thomas) v Thomas** [1947] 1 All ER 582); and with an award of damages only where it results from an error of law or so inordinately disproportionate as to be plainly wrong (see **Jamaican Redevelopment Foundation, Inc v Clive Banton and Another** [2019] JMCA Civ 12 citing **Cadet's Car Rentals and another v Pinder** [2019] UKPC 4).

[12] It was against this background of the applicable principles that I considered the learned judge's judgment, the grounds of appeal challenging it, and the submissions of counsel for the parties.

[13] On the material before this court, I formed the view that Sigtex has an arguable appeal with some prospects of success in relation to grounds (d), (e), (f), and (g) of the amended notice and grounds of appeal. Those grounds respectively raise issues as to the learned judge's conclusions that the injuries found to have been suffered by Mr Martin were caused by Sigtex's breach of duty; that given the evidence before the court, Mr Martin was not contributorily negligent; and that the award of general damages is excessive having regard to the range of awards in previous cases involving claimants with similar issues. The impact of these challenges is a matter that will have to be thoroughly investigated at the hearing of the appeal, as they each contributed significantly to the learned judge's findings of liability and assessment of the general damages awarded to Mr Martin.

[14] In sum, I formed the view that Sigtex has an arguable appeal with some merit. Sigtex's challenges to the learned judge's findings of fact require full ventilation in this court in the light of evidence adduced in the court below. Therefore, the first question is, answered affirmatively, in favour of the continuation of the stay of execution.

[15] The remaining question is whether the granting of a stay is the order that is likely to produce less injustice between the parties, to which attention is now turned.

The risk of injustice

[16] The court must examine all the facts and circumstances before it and determine whether the risk of injustice to either party favours or disfavors the grant of a stay of execution (see **Hammond Suddard Solicitors v Agrichem International Holdings** [2001] All ER (D) 258) ('**Hammond Suddard**'). In assessing the risk of injustice to the parties, there is no closed list of circumstances that must be considered or weighed in the balance. It is, however, accepted that the following considerations are material to the exercise of the court's discretion to grant or refuse a stay:

- (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 **Sagicor Bank Jamaica Limited (formerly known as RBTT Bank Jamaica Limited) v YP Seaton and others** [2015] JMCA App 18 at para. [51] citing **Hammond Suddard; Green v Wynlee Trading Ltd and others** [2010] JMCA App 3 and Blackstone's Civil Practice 2004, paragraph 71.38)

[17] In essence, the court is required to balance the interests and risks faced by the parties and to make an order that would cause the least injustice. In other words, the court is required to make an evaluative judgment and determine whether the balance of injustice favours the grant of a stay of execution.

[18] Sigtex contended that the balance of injustice favours the continuation of the stay of execution for two reasons. The first is that the payment of the judgment debt to Mr Martin will have a severe financial impact on Sigtex's operations. Sigtex, in its evidence, describes its current financial position as "precarious". Counsel for Sigtex, Mr Neale, made it clear that it is not Sigtex's position that it is bankrupt. Rather, Sigtex's position is that it will not be able to cover its operational costs, and will be forced to liquidate its fixed assets to satisfy the judgment debt if the judgment debt is required to be paid before the appeal is determined. Thus, if the judgment is paid at this time, Sigtex's existence as a business will be imperilled and the appeal will be stifled. In support of its contentions, Sigtex exhibited to its affidavits in support of the application, Audited Financial Statement for the year ending December 2021 and its Form IT02 Annual Return of Tax and Income Payable filed in respect of the year 2022.

[19] Reliance by a company on its impecuniosity in support of an application for a stay must be supported by evidence that gives "a full understanding of the true state of the

company's affairs". Evidence of that nature enables the court to evaluate the risks of allowing enforcement to proceed if a stay of execution is not granted (see **Hammond Suddard** at para. 20). It is observed that neither of the documents exhibited to Sigtex's affidavits represents the company's current financial position. While the Audited Financial Statement and the Form IT02 can arguably show a trend in Sigtex's financial position from 2021 to 2022, they do not support Sigtex's contention that it is not presently in the position to pay the judgment debt without imperilling its operations and existence. Therefore, Sigtex's assertion of impecuniosity, being unsupported by evidence of its financial position that is reasonably contemporaneous with this application, does not advance its request for the continuation of the stay.

[20] The second reason advanced by Sigtex is that Mr Martin is an impecunious litigant. Sigtex has referred to him in its affidavit in support of the application as "an individual without significant means". Sigtex contended that it would not be able to recover the judgment sums from Mr Martin if it succeeds in its appeal against the learned judge's judgment. Thus, the balance of injustice favours the grant of a stay.

[21] Mr Kinghorn, in his submissions on behalf of Mr Martin, highlighted that the appeal was filed in January 2024 and that the notes of evidence have not yet been received from the Supreme Court. He submitted that, in the circumstances, it may take up to two years from the date of this hearing to secure a hearing date for the appeal. Mr Kinghorn also pointed out that Mr Martin has been without work since 2014 and that the extension of the stay will continue to deprive him of the fruits of his judgment.

[22] I accept Sigtex's submissions on this point. Mr Martin, in his affidavit filed in opposition to the application, has accepted and agreed with Sigtex that he is an individual without significant means. In his own words, he is "very poor", "living hand to mouth" and reliant on his wife and "good Samaritans" for financial support. He indicated that he "cannot work" and needs the proceeds of the judgment to "be a man to [his] family again, and not continue to rely on handouts". I understand Mr Martin's evidence

to be a candid admission that, when the judgment sum is paid over to him, he will use the money to financially support himself and his family.

[23] Given Mr Martin's financial position, I believed that if the *ex parte* stay was lifted, the judgment debt enforced, and Sigtex required to pay the judgment sum over to Mr Martin, there would be a real risk that Sigtex would not be able to recover any money paid over to Mr Martin in the event the appeal succeeds. In the circumstances, the risk of injustice to Sigtex, in the event the appeal is successful, is high.

[24] As to the risk of injustice to Mr Martin, Mr Kinghorn rightly pointed out that the appeal is in its infancy, having only been filed in January this year. No significant steps have been taken to advance the appeal beyond the present application. This is understandably so as the notes of evidence have not yet been received from the Supreme Court. In the circumstances, there is potential for significant time to elapse between any extension of the *ex parte* stay and the determination of the appeal. Thus, as Mr Kinghorn submitted, the effect of continuing the *ex parte* stay would be to indefinitely deprive Mr Martin of the fruits of his judgment pending the determination of the appeal, in circumstances where he is unemployed and dependent on his wife and others to meet his needs.

[25] There is obvious financial inequity between the parties. Mr Martin is, admittedly, a 'man of straw'. However, having weighed the positions of both sides in the balance, I formed the view that the risk of injustice to Sigtex, was unignorably real and tangible if the *ex parte* stay was lifted. This is particularly so in circumstances where Sigtex has an appeal with some merit, with the real possibility that the court might reduce or altogether set aside the award of damages against it, leaving Sigtex at risk of never recovering monies it pays over to Mr Martin if the stay is lifted. The balance of injustice, in my view, favours the extension of the *ex parte* stay.

[26] In the circumstances, I concluded that the balance of injustice favours the continuation of the stay of execution.

Should the *ex parte* stay be extended?

[27] Having concluded that Sigtex has an appeal with some merit and that the risk of injustice would be greater to Sigtex if the stay were refused than it would be to Mr Martin, I am of the view that the *ex parte* stay should be extended until the determination of Sigtex's appeal.

[28] Mr Kinghorn had submitted that if the court was minded to extend the *ex parte* stay, it should only do so on the condition that a portion of the award of damages, in the sum of \$3,000,000.00, be paid over to Mr Martin pending the determination of the appeal. He cited **Jamaica Public Service Company v Rosemarie Samuels** [2021] JMCA App 15 (**'Rosemarie Samuels'**), a case in which Simmons JA granted a stay of execution of an award of damages made in the Supreme Court on condition that the appellant paid a portion of the judgment sum over to the respondent (see para. [2]). I am not persuaded that such a course would be appropriate in this case.

[29] **Rosemarie Samuels** was an appeal from an assessment of damages flowing from the grant of summary judgment against the appellant. The dispute between the parties was limited to the quantum of damages. Critically, there was agreement between the parties that the appellant was entitled to damages that were accrued over, at least, a period of 11 years, even if the appeal were to be allowed and the award of damages reduced by the court, as the appellant sought (see para. [59]). Accordingly, the appellant's appeal was concerned only with a possible reduction in the award of damages, within a certain agreed range.

[30] Quite differently from **Rosemarie Samuels**, Sigtex's appeal challenges the judge's findings on both liability and quantum. Therefore, there is a dispute between the parties which could result in the disturbance of the learned judge's orders on both liability and quantum on appeal. Furthermore, there is no agreement between the parties that Mr Martin would be entitled to any specific amount in damages. The circumstances of this appeal are, therefore, too far removed from those in **Rosemarie Samuels** to warrant similar treatment.

Disposal of the application

[31] In light of my finding that there is a real and tangible risk that Sigtex would not be able to recover any sums it pays over to Mr Martin if its appeal is successful, a conditional stay with payment out of any part of the judgment to Mr Martin would disproportionately expose Sigtex to potential injustice and so would not be appropriate.

[32] However, bearing in mind Mr Martin's evidence as to his financial circumstances and the arguments advanced regarding Sigtex's financial position, it is deemed to be in the interests of justice to extend the *ex parte* stay on the condition that Sigtex pays into either an account, or into court, a portion of the sum awarded to Mr Martin by the learned judge.

[33] It is for the foregoing reasons that I made the following orders set out at para. [2] above.