IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007 HCV 5004

IN THE CIVIL DIVISION

BETWEEN	HON. GORDON "BUTCH" STEWART	CLAIMANT
AND	MUNA ISSA	DEFENDANT/ANCILLARY CLAIMANT
AND	DR. PAULETTE ROBINSON	1ST ANCILLARY DEFENDANT
AND	JAMIE STEWART-McCONNELL	2ND ANCILLARY DEFENDANT
AND	OWEN JAMES	3RD ANCILLARY DEFENDANT
AND	NICKY FARQUHARSON	4TH ANCILLARY DEFENDANT

HEARD: March 17, and 24, 2009

Appearances: Allan Wood Esq. and Ms. Daniella Gentles instructed by Livingston. Alexander and Levy for the Claimant and the 2nd Ancillary Defendant; Abe Dabdoub Esq. and Raymond Clough Esq. instructed by Clough Long for the Defendant/Ancillary Claimant; (Mr. Dabdoub unavoidably absent)

Application for Stay of Execution of Order Pending Appeal; principles applicable; What amounts to special circumstances; Whether, if consequences of refusal of stay are less than ruinous to applicant, court can exercise discretion to stay Whether discretion unfettered.

ANDERSON J.

A few days ago, on March 9, 2009 I handed down a written decision in an application by the Defendant/Ancillary Claimant, Muna Issa, to strike out the claim of the claimant, the Hon Gordon "Butch" Stewart on the ground that it constituted abuse of process in that it disclosed no reasonable grounds for bringing the claim in light of the minimal publication alleged. I set out below the final version of the order which I made in that case.

1) The Defendant/Applicant's application to strike out is granted on the basis that to allow the matter to proceed to a full trial would be an abuse of the process of the Court, subject to the following orders:
    a) The order to strike out is stayed for 14 days and its coming into effect is conditional upon the Defendant/Applicant proffering to the Claimant an apology within the 14 day period.
    b) A written draft of the proposed apology is to be prepared jointly by counsel for the Claimant and the Defendant for submission to the Court for its approval as soon as it is prepared but in any event not later than March 18, 2009.
2) Costs to the Applicant/Defendant to be agreed or taxed.
3) Liberty to apply generally.
4) Leave to appeal granted, if necessary.

That order, as will be seen from the quote above, reflected the court's view that it should exercise its discretion to strike out the action on the basis advanced, but subject to the condition that an appropriate apology was to be issued by the defendant in respect of the limited publication to one Owen James, a journalist, and purported friend of the Defendant. It was common ground between the parties that the publication to James was the only publication of the document in question, by the Defendant. The Defendant/Ancillary Claimant has now filed an appeal against the ruling. Consequent upon the filing of the appeal the defendant's attorneys have now applied for a stay of execution of the order pending the determination of the appeal. That application is being resisted by the attorneys-at-law for the claimant ("Stewart").

The grounds on which the Applicant is seeking the order to stay are as follows:

1. That the Appeal against the Order of Mr. Justice Roy Anderson has more than a reasonable prospect of success in that:-
    a. The learned judge erred in law in
        i. Staying the order to strike out for 14 days; and

ii. Further erred in law in making the order to strike out conditional upon the defendant proferring an apology to the claimant within 14 day period (sic)

2. That the learned trial judge erred in law in also not striking out the claim on the basis that it does not establish a realistic prospect of establishing the commission of a real and substantial tort.
3. The learned judge erred in law in concluding that in making an order to strike out a claim as an abuse of the process of the court under Rule 26.3of the Civil Procedure Rules, Rule 26 and 27 of the said Civil Procedure Rules confers the jurisdiction and power to make such an order conditional upon an apology for an alleged publication which is yet to be proven to be libelous in law .
4. That the learned judge erred in law in deciding without affording the Defendant the opportunity to make submissions as to whether the words complained of in the letter were defamatory in law.
5. That the Learned Judge erred in Law in concluding that the Defendant should proffer an apology to the Claimant even though the Claim should be struck out as an abuse of the process of the Court.
6. That the interests of justice would be best served and valuable court time saved if the Court of Appeal determines that the Learned Judge erred in making the Order which is being appealed against.
7. That the question of whether a Judge of the Supreme Court has the jurisdiction and power to make an Order striking out a Claim as an abuse of process conditional upon the defendant proffering an apology as amends for a claim by the Claimant which the Court has found to be an abuse of process is a matter of importance as to the interpretation of the jurisdiction and powers of the Court as provided by the Civil Procedure Rules 2002.

I have decided that in the peculiar circumstances which obtain in this case and at this time and because of the close relationship between this and another connected matter previously decided by my learned brother Sykes J, that the application for a Stay should be granted. In that matter, (**Gordon "Butch" Stewart v John Issa et alios, HCV 2328 of 2007**), Sykes J. struck out the claimant's claim against the defendant in that action in respect of a purportedly

libelous document published by the defendant to his attorney. The document in question in that case is the same document which forms the basis of this action. Sykes J. struck out the claim on the bases that (1) the communication to the attorney was subject to privilege, and (2) that the bringing of the action was an abuse of process.

The applicant has submitted through her counsel, Mr. Clough that there should be a Stay because there was a real prospect of the appeal succeeding, and that it was appropriate for a stay to be granted. It was also submitted that it was likely that the hearing of the appeal would come up very shortly and so the claimant would not be prejudiced in any way by a grant of a stay.

On the other hand, Mr. Wood for the Respondent to the application urged the court to refuse the application on the basis that it did not meet the tests which were now set out in the case of ***LINOTYPE-HELL FINANCE LIMITED V BAKER (1992) 4 All E.R. 887.*** In that case it was held that in an application for a Stay of Execution pending an appeal "it is a legitimate ground for granting the application that the defendant is able to satisfy the court that without a Stay of Execution he will be ruined and that he has an appeal which has some prospect of success". That case also finally determined that: "The old rule that a Stay of Execution would only be granted where the appellant satisfies the court that if the damages and costs were paid there would be no reasonable prospect of recovering them if the appeal succeeded", is now far too stringent a test and does not reflect the court's current practice.

In dealing with these two bases that now apply to ground jurisdiction to grant a stay, I shall consider first the question of the "some prospect" of success in the appeal. The substantive application on which I had previously given a written judgment required the court to explore an emerging area of the law of torts, particularly as it affects an action for libel. My decision and reasoning closely followed those of the learned Sykes J, in the other case to which I have already referred. It is my understanding that the decision by His Lordship Skyes J. to strike out the claimant's action, (one basis there being that to allow it to proceed would be an abuse of process), is itself being appealed by the claimant. Given the emerging nature of this area of law of libel, I think it is of sufficient public general importance that Court of Appeal should have the opportunity of pronouncing its view as to the application of this area of the

law as it affects Jamaica. I would accept, therefore, that there is "some prospect" of success of the appeal in that it is "real" and not "fanciful". I should note, *en passant*, that it may be advantageous for the appeals to be heard together, if that were possible.

Secondly, while I accept that the prospect of ruination is a "legitimate ground" for exercising the discretion to grant a stay pending an appeal, it is not my view that that would be the only circumstance in which the discretion should be so exercised. Based upon the cases to which I refer below, the real ground upon which the discretion should be exercised is that there are special circumstances which make it just that there should be a stay. It will be recalled that the decision to strike out was made conditional upon an appropriate apology being provided (by agreement between the attorneys for the parties) and approved by the court, it being assumed that the words in the document complained of, were defamatory. According to the order, this should have been accomplished within a time frame of fourteen (14) days failing which, of course, the action would remain on the court list and proceed to trial. There has been up to this point no agreement on any apology and the defendant's attorney is also of the view that it was wrong to impose such a condition, and is appealing against that aspect of my ruling. That is, indeed, a specific aspect of the appeal.

In those circumstances, it if the Court of Appeal were to find that the imposition of such a condition was wrong in law, it would then have to consider whether it would be appropriate to strike out the action, or to remit the case to the Supreme Court for a determination as to whether an order to strike out, without more, would be appropriate. At the same time, if the appropriate apology was forthcoming, and the Court of Appeal were later to hold that such a condition was wrong in law, the giving of the apology could not then be undone and the defendant would have suffered a sanction which was really irreversible, the horse having already bolted.

In a recent libel case, **Convery v The Irish News Limited (2007) NICA 40** a decision of the Northern Ireland Court of Appeal, the applicant for a Stay of Execution raised two (2) grounds in support of the application. The first was that "the imminence of the appeal strongly favoured the grant of a Stay of Execution of the order". Secondly, that there was an

ongoing police investigation into the possibility that jury tampering had taken place. The Northern Ireland Court of appeal did not consider the second limb of the submission. However, the court decided that it was, nevertheless, appropriate to grant the stay in the circumstances of the case.

I set out below, an extended section of the judgment of Kerr LCJ as to the approach that courts follow with respect to applications of this nature.

The approach to be followed

> This is conveniently summarised in the 1999 volume of the Supreme Court Practice at 59/13/2 (pp 1076/7): - "An appeal does not operate as a stay on the order appealed against, except to the extent that the court below, or the Court of Appeal ... otherwise directs. ... If an appellant wishes to have a stay of execution, he must make express application for one ... Neither the court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. The court does not 'make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which *prima facie* he is entitled', pending an appeal (***The Annot Lyle* (1886) 11 P.114 at 116, CA; *Monk v Bartram* [1891] 1 QB 346**) ... The question whether to grant a stay is entirely in the discretion of the court (***Becker v Earl's Court Ltd* (1911) 33 SJ 206; *The Ratata* [1897] P 118 at 132; *A-G v Emerson* (1889) 24 QBD 56 at 58, 59**) and the court well grant it where the special circumstances of the case so require ... Where the appeal is against an award of damages, the long established practice is that a stay will normally be granted only where the appellant satisfies the court that, if the damages are paid, then there will be no reasonable prospect of his recovering them in the event of the appeal succeeding (***Atkins v Great Western Railway Co.* (1886) 2 TLR 400** following ***Barker v Lavery* (1885) 14 QBD 769 CA** ... In ***Winchester Cigarette Machinery Ltd v Payne (No 2)* (1993) The Times, December 15** ... the court made it clear that a stay should only be granted where there are good reasons for departing from the starting principle that the successful party should not be deprived of the fruits of the judgment in his favour. The court also emphasised that indications in past cases do not fetter the scope of the court's discretion."

His lordship then made reference to the relevant rule in the White Book as it applied to the procedure for applying for a stay. He then continued:

> From these passages a number of useful rules can be recognised:

1. The grant of a stay lies within the discretion of the court; previous indications as to how that discretion has been exercised are instructive but not prescriptive and each case will depend on its own unique circumstances;

2. An application for a stay should be made first to the judge at trial; the reasons for this are obvious – the judge will normally have a greater insight into the possible merits of an appeal than will be available to the Court of Appeal;

3. In general, good reasons that a stay should be granted must be demonstrated by the party that seeks it and the mere existence of an appeal will not normally qualify;

4. The ability of the plaintiff to repay damages in the event of a successful appeal is relevant to the question whether a stay should be granted but if the defendant maintains that the plaintiff will not be able to repay, he must support that claim with evidence.

I respectfully adopt the reasoning of the court in relation to the instant application and would hold that the approach is consistent with our Civil Procedure Rules and, in particular, the over-riding objective. If this is the correct approach, and I respectfully submit that it is, then the "prospect of ruination on the part of the losing defendant, applicant for the stay", (per ***Linotype-Hell***) ought not to be seen as being a definitive statement of the criterion to be fulfilled, but rather as an example of the "special circumstances" which, in the court's discretion, ought to trigger the exercise of the court's discretion to grant a stay. Indeed, this proposition is supported by (**HALSBURY 4th Ed Vol. 17 p.272 para 455**). There the point is made that the granting or refusing of stay is in the absolute and unfettered discretion of the Court; and the Court will, as a rule only grant a stay if there are "special circumstances". An example of *"special circumstances"* is that an appeal would be nugatory if stay was refused (**WILSON v CHURCH (No. 2) (1879) 12 Ch.D 454, C.A.**)

In the Fijian case of ***FRESH FISH EXPORTERS (FIJI) LTD. V WASAWASA FISHERIES LTD (ADMIRALTY ACTION NO: 4 OF 1992) [1996] FJHC 124***, the Fijian High Court considered an application for a stay of execution of certain orders of the court, pending the hearing of an appeal. The successful plaintiff had been awarded possession of a shipping vessel the Sunbird, and also got an order for its immediate transfer into the name of the plaintiff, subject to it making a payment of $235,000.00 within six weeks from the date of

the judgment. If there was a failure to make the payment, the defendant could treat the contract under which the vessel was to have been transferred as being rescinded and it could do with the vessel whatever it chose.

The Plaintiff failed to comply with the requirement to pay the sum of $235,000 to the defendant by the due date. It was seeking to appeal inter alia, against that part of the judgment where it said it was open to the defendant to *"do what it likes"* with the ship *"Sunbird"*, in the absence of the payment. In the circumstances the Plaintiff did not want the ship to be sold or dealt with in any manner until the appeal was heard. It wanted the status quo to be preserved. The Plaintiff sought a stay of the order pending its appeal against the judge's ruling. The application was granted. The learned judge opined:

> On the affidavit evidence before me and on the submissions by counsel I find that there are *"special circumstances"* in this case. There is a Court order requiring the Plaintiff to pay the sum of $235,000 and if it is not paid then certain consequences flow; and it is the impact of this part of the judgment which is the gist of the appeal. The refusal of the application will no doubt render the appeal nugatory.

In the instant application, there is an order for an apology as a condition of the striking out. If the condition is not fulfilled, the case goes forward. I do believe that there is somewhat of an analogy, (maybe only slightly forced) between that case and the instant one, in that the successful party in the application (and by virtue of the possible striking out here, in the action) is being required to fulfill a condition in order to secure the full benefits of its success. Here, the fulfillment of the condition would render nugatory, success in the appeal if the Court of Appeal took the view that the requirement to make an apology was an inappropriate condition, as the applicant would be denied the "full fruits" of the striking out, that is striking out without condition. As noted above, the apology would be irreversible. I believe that the circumstances with which the court is faced her are "special" and the court has an unfettered discretion, once that is established, to grant the stay sought by the applicant.

Given what I have stated above, the application for the stay pending the determination of the appeal is granted.

Costs of this application are to abide the outcome of the appeal.

Roy K. Anderson
Puisne Judge
March 25, 2009