[2016] JMCA Civ 6

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 31/2005

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

BETWEEN	**CROWN MOTORS LIMITED**	**1ST APPELLANT**
AND	**KEY MOTORS LIMITED**	**2ND APPELLANT**
AND	**EXECUTIVE MOTORS LIMITED**	**3RD APPELLANT**
AND	**FIRST TRADE INTERNATIONAL BANK & TRUST LIMITED (IN LIQUIDATION)**	**RESPONDENT**

Ms Carol Davis for the appellants

Dr Lloyd Barnett and Keith Bishop instructed by Bishop & Partners for the respondent

27, 28 May, 18, 22 June 2015 and 29 January 2016

MORRISON JA

[1] I have read in draft the judgment of my sister Sinclair-Haynes JA (Ag) and agree with her reasoning and conclusion. There is nothing I can usefully add.

DUKHARAN JA

[2] I too have read the draft judgment of Sinclair-Haynes JA (Ag). I agree with her reasoning and conclusion and have nothing to add.

SINCLAIR-HAYNES JA (AG)

[3] Campbell J, on 2 April 2004, ordered the sale of premises owned by Crown Motors Limited, the 1st appellant (Crown), which was situated at 8 Marescaux Road, Kingston 5. On 10 March 2005, the learned judge dismissed Crown's application for a stay of execution from his order for sale of the premises pending the determination of its appeal against that order. Consequently, this is an appeal from the order of Campbell J dismissing Crown's application for a stay of execution.

[4] In reviewing the exercise of a judge's discretion, an appellate court ought not to impose its discretion even if it would have exercised its discretion differently. Interference with a judge's discretion will only be warranted if the judge misunderstood the law or the evidence. So too, if the judge arrived at conclusions on inferences which were correct at the trial but at the appeal, a change in circumstance or the emergence of further evidence rendered the decision to be plainly erroneous – (see Lord Diplock's statement (at page 220) in **Hadmor Productions Ltd and Others v Hamilton and Another** [1983] 1 AC 191). Or, if the judge, as Lord Fraser of Tullybelton in **G v G** [1985] 2 All ER 225, 229 put it, "has exceeded the generous ambit within which a reasonable disagreement is possible". It is therefore necessary to examine the

circumstances of the instant case to determine whether the learned judge's exercise of his discretion in refusing to grant the stay was demonstrably wrong.

The background

[5] If ever a matter has had a long and chequered history, this one has. This matter has its genesis in an action filed, on 20 March 1997, by First Trade International Bank & Trust Limited (the Bank), against Crown for the sum of US$209,669.21. The Bank also instituted claims against Executive Motors Limited (Executive) and Key Motors Limited (Key) for the sums of US$89,876.69 and US$233,075.37, respectively. Key and Executive counterclaimed.

[6] Crown, Executive and Key were dealers in cars and car parts imported from Japan and Korea. Mr Desmond Panton was the chairman of all three companies. It was the agreement between the Bank and Crown, Executive and Key, that the car dealers would deposit one half of the required amount to establish letters of credit required to purchase the cars and car parts. The Bank was to provide a loan for the other half of the letters of credit. Upon payment by Crown, Key and Executive, the Bank ought to have confirmed the letters of credit to the suppliers. Upon presentation by the suppliers to the Bank of the necessary documents pursuant to the letters of credit, the Bank ought to have paid the suppliers whereupon the cars and car parts which were ordered would be shipped by the suppliers.

[7] In 1995, however, problems developed. The Bank experienced liquidity problems and eventually went into voluntary liquidation. Consequently, the relationship between the parties ended with the Bank instituting proceedings as aforesaid.

Crown's case

[8] No issue was taken by Crown regarding its indebtedness to the Bank. Crown's contention was that it (Crown), Key and Executive made the requisite deposit to the Bank, but the Bank was unable to fulfil its part of the agreement because of liquidity problems. Although Crown, Key and Executive duly deposited the required sums with the Bank for the letters of credit, as a result of the Bank's liquidity problems, the suppliers were unable to access the letters of credit as the sums deposited were not paid by the Bank. Crown, Key and Executive consequently encountered serious difficulties. They were informed by the suppliers that their orders would not be supplied because of the Bank's failure to pay.

[9] On 18 September 1997, the Bank's claims against Crown, Key and Executive were consolidated by an order of C Orr J. Crown's failure to file its defence resulted in K Harrison J entering judgment in default of defence against it, on 25 June 1998, in the following terms:

> "**IT IS THIS DAY ADJUDGED** that the [Bank] do recover from [Crown]:
>
> 1. the said sum of US$209,669.21 as well as interest on the said sum of US$209,669.21 at the rate of 9% per annum from service of the Writ until judgment; and

2. the said sum of US$209,669.21 be lodged within 90 days of the date hereof into an interest bearing account in the joint names of the Attorneys-at-law representing the parties at The Bank of Nova Scotia Jamaica Limited, Commercial Banking Centre to abide that outcome of the trial of the consolidated actions."

[10] Harrison J's order was not obeyed. The Bank, consequently, sought and obtained an order from Campbell J, on 2 April 2004, for the sale of premises at 8 Marescaux Road, Kingston 5 to satisfy the judgment debt. That order was appealed by Crown, but the appeal was eventually struck out on 20 December 2013 for want of prosecution.

[11] Between 8 November and 4 December 2004 efforts were made by the Bank to sell the premises via advertisements in newspapers. Shortly thereafter, on 21 January 2005 Ms Carol Davis and Dehring, Bunting & Golding Limited made a repurchase agreement in trust for Executive for the sum of US$335,000.00. On 28 January 2005 the registrar's report was signed. On 7 February 2005, McIntosh J gave her decision in favour of Key in the sum of US$309,320.00 with interest and in favour of Executive Motors, in the sum US$130,995.13 with interest. On 10 February 2005, Key entered into a deed of assignment wherein it assigned its judgment of US$309,320.00 to Crown.

[12] On 14 February 2005, Crown applied for a stay of proceedings with respect to the sale of the premises at 8 Marescaux Road, but the application did not find favour with Campbell J, who dismissed the application on 10 March 2005. Consequent on Crown's failure to persuade Campbell J to stay the proceedings, Crown, Key and

Executive (collectively called "the appellants") moved this court, by way of a notice of appeal filed on 11 March 2005, for the following orders, *inter alia*:

> i. The order of Campbell J made on 10 March 2005 be set aside.
>
> ii There be a stay of proceedings with respect to the order for sale of premises at 8 Marescaux Road Kingston 5 made by Campbell J on 2 April 2004.
>
> iii. That the monies currently held in account at Dehring Bunting & Golding Limited be transferred into the joint names of the attorneys-at-law for the Bank and the appellants or in the alternative be transferred into an account in the joint names of the attorneys-at-law for the Bank and the appellants at the Bank of Nova Scotia Jamaica Limited, Commercial Banking Center, until ordered otherwise.

[13] The grounds on which the appellants sought the orders were outlined as follows:

> "(i) The Learned Judge in Chambers erred in refusing to grant the Order for Stay of proceedings with respect to the Order for Sale of Premises at 5 [sic] Marescaux Road, Kingston [sic]

(ii) The Learned Judge in Chambers erred in refusing the [sic] grant an Order that the monies held in account 02MOB811294 at Dehring Bunting & Golding Limited be transferred into the joint names of the Attorneys-at-law for the [Bank] and the [appellants] herein or in the alternative be transferred into an account in the joint names of the Attorneys-at-law for the [Bank] and the [appellants] at the Bank of Nova Scotia Jamaica Limited, Commercial Banking Center, until further Order of this Honourable Court.

(iii) That the Learned Judge in Chambers erred in that there was no need to proceed with the Sale of the premises, because the Order for Sale had been granted to enforce the judgment of the Honourable Mr. Justice Karl Harrison made on the 25th June, 1998, and all the monies required to satisfy the said judgment were available to be paid into a joint account in the names of the Attorneys-at-law for the parties in accordance with the said Order of the Honourable Mr. Justice Karl Harrison.

(iv) The Learned Judge in Chambers erred in that the Judgment of the Honourable Mr. Justice Karl Harrison aforesaid had required the monies to be put into a [sic] account in the joint names of the Attorneys-at-law representing the parties 'to abide the outcome of the trial of the consolidated actions'. The Trial of the consolidated actions has now concluded and in the said trial the amount awarded to the 2nd and 3rd appellants exceed the amount due to the [Bank] in the matter against [Crown]."

Preliminary objection

[14] The Bank has launched a two pronged preliminary attack on the appellants' appeal. The first was based on the appellants' failure to file and serve its written submissions in support of the appeal with the notice of appeal. The second was the

unsustainability of its appeal in the absence of a subsisting appeal against Campbell J's order of 2 April 2004 for sale of the premises at 8 Marescaux Road, Kingston 5.

[15] Dr Barnett argued, on behalf of the Bank, that the appellants had failed to comply with rule 2.4(1) of the Court of Appeal Rules (CAR) which provides:

> "On a procedural appeal the appellant must file and serve written submissions in support of the appeal with the notice of appeal."

Further, the appellants had not applied for an extension of time to comply.

[16] In support of its application to strike out the appellants' appeal for its failure to comply with rule 2.4(1), reliance was placed on the cases **Watersports Enterprises Limited v Jamaica Grande Limited and others** [2012] JMCA App 35 and **Peter Haddad v Donald Silvera** SCCA No 31/2003, delivered 31 July 2007.

[17] It was submitted that the Bank's application for the sale of the said premises was filed on or about 17 April 2001. On 2 April 2004, Campbell J granted the application. That order was appealed by Crown but was not pursued. It was consequently struck out by the Court of Appeal on 20 December 2013. Without an appeal, it was submitted, the appellants' appeal against Campbell J's order refusing a stay could not stand, as in the absence of an appeal, the appellants would be unable to demonstrate that they have a real prospect of succeeding. In support of that proposition, Dr Barnett cited the case of **Linotype-Hell Finance Ltd v Baker** [1992] 4 All ER 887.

[18] It was counsel's further submission that the appellants' appeal was in any event baseless because sections 254 and 255 of the Judicature (Civil Procedure Code) Law (as amended in 1960) authorised the granting of default judgment against a defendant in a consolidated matter.

[19] It was the applicant's evidence that he had instructed his attorney-at-law to file an appeal against Campbell J's order and a notice of appeal had been duly filed. He was informed by his attorney that the Supreme Court had not yet provided the necessary certificate that all the required documents in the matter were available and to date this has not been supplied. To his affidavit, he attached copies of the correspondence to the registrar.

[20] Ms Davis, counsel for the appellants, however pointed out that Crown had taken no issue with the default judgment obtained against it. She however staunchly refuted the Bank's following assertion that:

> "(2) the [appellants have] filed [sic] to apply for an extension of time to comply with the said Order within a reasonable time or at all;
>
> (3) the [appellants'] inordinate delay in pursuing the appeal and in complying with the Rules is prejudicial to the Respondent;
>
> (4) no reasonable explanation for the delay has been provided; and
>
> (5) the appeal is intrinsically defective as it is directed against an Order dismissing an application for stay pending an appeal which appeal has been struck out and is no longer pending."

[21] Ms Davis submitted that an application for extension of time was filed and the application granted on 24 September 2014, permitting the appellants to file skeleton submissions by 14 October 2014. The appellants filed their skeleton submissions on 2 October 2014. Learned counsel contended, relying on the notice of appeal filed on 11 March 2005, that the instant appeal is an appeal against the order of Campbell J dismissing the application for stay of execution and same is not contingent on any other appeal. She argued that the appeal that was struck out on 20 December 2013 related to the order of Campbell J, on 2 April 2004, for the sale of the premises at 8 Marescaux Road and that appeal had nothing to do with the order refusing stay of execution.

[22] At this juncture, I must state my agreement with Ms Davis' submission that Crown's re-issued notice of application for court orders of 14 February 2005 for stay of proceedings was not predicated on an appeal. A judge of the Supreme Court may autonomously order a stay of proceedings. This power is derived from section 48(e) of the Judicature (Supreme Court) Act which provides:

> "With respect to the concurrent administration of law and equity in civil causes and matters in the Supreme Court the following provisions shall apply—
>
> ...
>
> (e) No proceeding at any time when pending in the Supreme Court shall be restrained by prohibition or injunction, but every matter of equity on which an injunction against the prosecution of such proceeding might have been obtained if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto; but

> nothing in this Act contained shall disable the Court from directing a stay of proceedings in any cause or matter pending before it if it think fit, and any person, whether a party or not to any such cause or matter, who would have been entitled if this Act had not been passed, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, **shall be at liberty to apply to the said Court, by motion in a summary way, for a stay of proceedings, either generally or so far as may be necessary for the purposes of justice, and the Court shall thereupon make such order as is just**." [Emphasis added]

[23] By virtue of rule 42.13 of the Civil Procedure Rules 2002 (the CPR) a judgment debtor may apply to the court to stay execution of a judgment or order. The rule states as follows:

> "A judgment debtor may apply to the court to stay execution or other relief on the grounds of –
>
> (a) matters which have occurred since the date of the judgment or order; or
>
> ..."

The Appeal

Ground (i) - "The Learned Judge in Chambers erred in refusing to grant the Order for Stay of proceedings with respect to the Order for Sale of Premises at 5 [sic] Marescaux Road, Kingston [sic]"

Submissions on behalf of the appellants

[24] Ms Davis submitted that Campbell J erred when he refused to stay the sale of premises at 8 Marescaux Road, where it was shown that Crown was in a position to

satisfy its debt and the Bank was a company in liquidation, with no assets in Jamaica. She conceded that Crown came to the Court late, but argued that the overriding objective warranted the granting of a stay of execution.

[25] Learned counsel contended it would be "unfair and inequitable" for the order for sale to be implemented given that the Bank was dealing with all three appellants in similar transactions. Further, she argued, if Key and Executive were successful in their appeal against the Bank, with the proceeds from the sale of the property removed from Jamaica, Key and Executive would "join a line of creditors of the Bank". Thus a fair and equitable procedure would be to set off the amounts owed by Crown against that owed to Key and Executive. Accordingly, Ms Davis submitted that the learned judge clearly exercised his judgment on the wrong principles and that his judgment ought to be set aside and a stay of the order for sale be granted.

Submissions on behalf of the Bank

[26] It was Dr Barnett's submission however that Harrison J's order which was made 17 years ago had not been complied with. He highlighted Mr Panton's evidence that Crown was no longer trading because in September 1997 it had lost the dealership for Honda motor cars. Hence since Crown has not conducted business on the premises, it would suffer no prejudice if the property is sold.

[27] He pointed to the dishonesty in Mr Panton's evidence that Crown was unable to comply with Harrison J's order because its only assets were premises at 29 Hagley Park Road which were heavily encumbered with a mortgage and thus difficult to sell and

Honda car parts valued at $15,000.00. He brought to the court's attention that it was through the Bank's effort that the property at Marescaux Road, the subject of the appeal, was discovered.

[28] The court, he submitted was therefore obliged to examine the risk of injustice to the parties on the grant or refusal of a stay. The fact that the Bank has been kept away from the fruits of its judgment for well over 14 years, puts it at risk of suffering injustice.

[29] Crown has not shown, over the many years, its inability to pay the sum. There was no application by Crown to vary the order or to ask for an extension of time to pay until after the order was made for the sale of the property. He relied on the case **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065 in support of this proposition.

[30] It was learned counsel's submission that a fundamental requirement for the exercise of discretion for the grant of a stay is that there must be some basis on which to do so. Crown had not presented any reason or basis on which a stay could be granted. He relied on **Carmen Farrell and others v Lascelle Reid and others** [2012] JMCA App 16.

[31] It was his further submission that he who seeks equity must do equity. Crown was obliged to show that it had done everything possible to obey the orders made by Harrison J and Campbell J. On the contrary, Crown has prevented the Bank from accessing the fruits of its judgment, by:

(a) having Ms Carol Davis, on 21 January 2005, purchase Government of Jamaica Global Bonds to mature on 15 January 2022, held on trust for Executive Motors Limited;

(b) assigning the debt/judgment;

(c) pointing the court to payment of money into an account at another bank, which was not ordered by the court; and

(d) Mr Desmond Panton's omission to include premises at Marescaux Road, Kingston 5 in his affidavit and his assertion that Crown's only real property was that situated on Hagley Park Road.

Discussion

[32] It is settled law that a successful litigant is entitled to the fruits of his judgment. The orthodox principle which guides the court in the exercise of its discretion to grant a stay of execution is that a stay ought to be granted if an unsuccessful defendant faced ruin without the stay and he has an appeal which had some prospect of success. Staughton LJ's statement in **Linotype-Hell Finance Ltd v Baker** heralded the modern approach to the grant of a stay of execution. He expressed that the old rule requiring an appellant to satisfy 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 was not reflective of the court's current practice.

[33] This court in **Flowers Foliage and Plants of Jamaica Ltd and others v Jamaica Citizens Bank Limited** (1997) 34 JLR 447, adopted this modern position. Rattray P said, at page 452:

> "Courts of equity do not shackle themselves with unbreakable fetters if the justice of the particular case demands a flexible approach."

[34] The court in **Hammond Suddard Solicitors v Agrichem International Holdings Ltd**, at paragraph [22], expanded the circumstances under which a stay ought to be granted. In that case, Clarke LJ opined:

> "…Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, 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 unable to recover any monies paid from the respondent?"

The more equitable approach has been accepted as the proper one by our courts and those of our Caribbean neighbours (See **Cable and Wireless Jamaica Limited (trading as LIME) v Digicel (Jamaica) Limited** HCV 04656/2009, judgment delivered 6 November 2009; **Watersports Enterprises Ltd v Jamaica Grande**

Limited Grand Resort Limited v Urban Development Corporation SCCA No 110/2008, App No 159/2008, judgment delivered 4 February 2009; **Reliant Enterprise Communications Limited and Twomey Group Limited v Infochannel Limited** SCCA No 99/2009, App Nos 144 and 181/2009, judgment delivered 2 December 2009; and **Marie Makhoul v Cicely Foster** HCVAP 014/2009, decision of the Eastern Caribbean Court of Appeal (Antigua and Barbuda) delivered on 26 August 2009.) The question here is, whether in these circumstances the refusal was warranted.

Were the principles correctly applied?

[35] Was the learned judge's conclusion that Crown had failed to make out "any special circumstance that would incline [him] to the view that it is inexpedient to enforce the judgment" justified?

[36] The equitable maxims, he who seeks equity must do equity and he who comes to equity must come with clean hands, cannot be ignored. Mr Panton, on behalf of Crown, did approach the court with soiled hands. It was his evidence that the only property which Crown possessed was a heavily encumbered property situated at Hagley Park Road. As was discovered, this was an untruth. Should this fact disqualify Crown's application, without more or ought the totality of the evidence to be considered?

[37] Although dishonesty must not be countenanced, the overarching consideration is the risk of injustice, hence the necessity to consider the evidence in its totality. Indeed, a balancing act is necessary in determining whether the deprivation of the fruit of the

Bank's judgment outweighs the risk of a judgment in favour of Key and Executive being rendered nugatory.

[38] It was Ms Davis' submission that the Bank was also guilty of disobeying Campbell J's order of 2 April 2004. Between 27 November 2004 and 8 December 2004 it caused the property to be advertised thrice in disobedience of the judge's order which required:

> "That such enquiries be made by the Registrar of the Supreme Court as may be necessary for the proper execution of the [order] for sale."

[39] She said that up to the date of the Mr Panton's affidavit in support of the application for stay of proceedings (filed on 8 December 2004), no enquires had been made pursuant to Campbell J's order. Mr Panton complained that Crown had written to the registrar and on 4 August 2004, its attorney had also written to the court and copied the letter to the Bank's attorneys-at-law reminding them of the legal requirements that the enquiry be taken. The Bank's attorneys-at-law responded to the letter but had still not set down the registrar's enquiry for hearing.

[40] The Bank, Mr Panton said, despite the letter from Crown's attorney, although she was not personally involved, proceeded to advertise the sale of the premises without enquires taken. The premises were slated to be auctioned on 16 December 2004 and were advertised to be sold at auction on three occasions, between 27 November 2004 and 8 December 2004. The advertisements caused great embarrassment and harm to Executive and to the other companies in his group of companies.

[41] Mr Panton averred that the sale of the premises would greatly prejudice Executive because it has operated its business at those premises since 1987 and Executive and the other companies in his group of companies have equipped the said premises particularly for the business operated by them.

[42] Mr Bishop contended in his affidavit that enquires were taken and the registrar was satisfied that the title was free from caveat or any encumbrance which would affect the transfer of the said premises.

[43] The evidence however, is that the registrar's report was in fact signed on 28 January 2005 which was after the property had been advertised thrice. The Bank therefore acted in disobedience of Campbell J's order of 2 April 2004.

Crown's reasons for its failure to comply

[44] The reason advanced by Crown for its failure to comply with the Harrison J's order of 25 June 1998 was its impecuniosity. However a property belonging to one of the companies was eventually sold (albeit late) and the judgment sum was available. It cited the difficulties in arriving at the correct sum for not depositing the sum in an account in compliance with Harrison J's order. Ms Carol Davis deponed (in affidavit filed 24 January 2005) before the learned judge that the amount $366,809.60 which Mr Bishop asserted was due on the said judgment was erroneous. His arrival at that figure, by compounding the judgment sum of US$209.669.21 annually at 9% as at 25 June 1998 was incorrect as he was not entitled to compound the interest payable on the judgment. Mr Bishop, she said, refused to agree the sum to be paid into the account.

[45] Further, although Crown was aware that the judgment was for the sum of US$209,669.21 with interest at 9% per annum, it was unsure of the amount that was due. It was Mr Panton's evidence (in affidavit filed on 8 December 2004) that, that fact notwithstanding, one of the other companies in his group of companies had since sold property belonging to it and was willing to put up the required sums as soon as the sum was identified.

[46] According to Ms Davis, Crown provided the sum of US$335,000.00. It was however not possible to set up the account as ordered. Consequently, on Crown's instructions, the sum was lodged to an account in her name, in trust for Executive, at Dehring, Bunting & Golding Limited. She expressed however a willingness to transfer the said sum to the Bank of Nova Scotia should this be required by the court. She gave her professional undertaking to pay the said sum to the Bank or part thereof upon the determination of the matters in the consolidated suit.

[47] Further, it was also her submission that Key had assigned the debt due from the Bank to Crown for consideration. They however, awaited clarification from the learned judge as to the exact date from which interest was due on the amount of US$209,669.21. The assignment of the amount due to Crown is more than the amount due to the Bank.

[48] According to Ms Davis, the learned judge was apparently of the view that the actions were separate and that the order for sale should proceed despite the fact that

the amounts owed to Key and Executive were more than that owed to the Bank by Crown.

The Delay

[49] The matters have spanned eight years having commenced in 1997 and were consolidated approximately six months after. Some eight months later, Crown had failed to file its defence resulting in the Harrison J's order for default judgment and the requirement that the said sum to be lodged within three months of the learned judge's order. The sum of US$209,669.21 should have been lodged by the latter part of 1998. It was not. Six years hence, Crown's failure to comply led to the Bank applying for and obtaining Campbell J's order for sale on 2 April 2004. Notwithstanding the subsequent applications and appeals thereafter it is evident that Crown's delay in attempting to comply with Harrison J's order was indeed inordinate. However the matter does not end there.

Were there good reasons?

[50] In attempting to justly balance the scales, the following pertinent questions have to be answered:

1. Has Crown proffered any good reason for its failure to comply?

2. If it has, how has that failure so to do affected the Bank?

In support of the Crown's application for a stay of proceedings before the learned judge, it cited the company's impecuniosity at the time of Harrison J's order for Crown's failure to comply.

[51] Mr Panton's evidence before the learned judge was that the trial of the matter between Executive and Key and the Bank concluded early in 2004 and judgment had been reserved by McIntosh J. He had anticipated an early delivery of the judgment at which time a final account between the Bank and his group of companies would have been settled.

Effect of the delay on the Bank

[52] Although the court frowns upon and will not countenance disobedience of its orders, it is necessary, in attempting to dispose of the matter justly to carefully consider the evidence. In analysing the evidence, the common sense approach as advocated by Brooks J (as he then was) in **Pfizer Limited v Medimpex Jamaica Limited et al** Claim No CL P040/2002, delivered on 4 July 2005, is the proper one.

[53] It is an important consideration that Harrison J's judgment in favour of the Bank was to abide the outcome of the consolidated matters. Indisputably, the Bank has not been kept from enjoying its fruits because it was not available for its enjoyment as evidently Harrison J regarded the matters as consolidated. Even if the Bank had succeeded against Key and Executive, the judgment against Crown would only have become available to it at the end of the trial against Key and Executive.

[54] Important factors were that the Bank was not Jamaican and consequent on liquidity issues, had filed for liquidation. On that ground, Crown would have satisfied the old unnecessarily stringent rule spoken of in **Linotype-Hell Finance Ltd v Baker** that a stay of execution would only be granted if the court was satisfied that if the damages and costs were paid there would be no reasonable prospect of recovering them if the appeal succeeded.

[55] Further at the time of the application for the stay of execution, the matter by the Bank against Key and Executive had been heard and the parties were awaiting McIntosh J's decision. This was conveyed to the learned judge. It would have been appropriate, in light of all the circumstances, for the stay of execution to have been granted. McIntosh J awarded judgment on 7 February 2005 in favour of Key in the sum of US$309,320.00 and in favour of Executive Motors, in the sum US$130,995.13.

Prejudice to the parties

[56] Mr Bishop pointed out that the second ground of the application for the stay of proceedings referred to the "Defendants" while the notice of application referred to a single defendant, Crown. Crown is the sole owner. The issue of prejudice, if it does exist, would be minimal to Crown he argued, as it was Mr Panton's evidence that Crown has, since September 1997 done little business. However Mr Panton's evidence was that Executive had occupied the premises since 1987 and that the premises had been improved to facilitate its business which would consequently be affected by the sale. There has been no challenge by the Bank to Crown's assertion countering the assertion

of prejudice to Executive or the prejudice as argued before the learned judge which would be occasioned by the premature and improper start of sale proceedings.

[57] Even upon the application of the stringent test, the balance would be tilted in Crown's favour. The learned judge ought to have considered, should Executive and Key succeed, what would have been their prospect of recovering any judgment and costs awarded against the Bank. That was a consideration which was plainly uppermost in the mind of Harrison J upon ordering the judgment awarded to the Bank to be held in an account in the joint names of the parties' attorneys and to abide the outcome of the other matters, bearing in mind the fact that the Bank is an overseas institution which was in voluntary liquidation when the application was made.

[58] The learned judge was also made aware that the trial of the matter against Key and Executive had concluded and McIntosh J had awarded judgment in favour of Key and Executive in a sum which exceeded that which was due to the Bank. In dealing justly with the matter, as is the overriding objective, the learned judge in light of the circumstances, ought to have acceded to Crown's application for the stay of proceedings. Indeed, as the matter now stands before this court, Executive and Key were victorious before McIntosh J and have obtained judgments in sums greater than that which was awarded against Crown.

[59] Is it, as posited on behalf of the Bank, that the application for a stay is without basis because Crown's matter was not consolidated with Key and Executive's matters? A

determination as to whether the matters were consolidated is important to the outcome of the case. It is therefore convenient to deal with ground (iv) at this juncture.

Ground (iv) – "The Learned Judge in Chambers erred in that the Judgment of the Honourable Mr. Justice Karl Harrison aforesaid had required the monies to be put into an account in the joint names of the Attorneys-at-law representing the parties 'to abide the outcome of the trial of the consolidated actions'. The Trial of the consolidated actions has now concluded and in the said trial the amounts awarded to the 2nd and 3rd Appellants exceed the amount due to the [Bank] in the matter against [Crown]."

[60] Crown cited the following as bases on which the orders, including a stay of proceedings, were sought.

> "i. The Order for Sale was made to procure the monies required for satisfaction of the Judgment of the Honourable Mr. Justice Harrison made on 25th June, 1998. The said judgment required that the monies to be paid by the Defendant be paid into a joint account in the joint names of the Attorneys-at-law representing the parties 'to abide the outcome of the trial of the consolidated actions'.
>
> ii. The Trial of the Consolidated actions is now complete and the Defendants in the consolidated suits have been successful. The Claimants now owe to the consolidated Defendants more monies than is due from the Defendant Crown Motors to the Claimant herein."

Were the matters consolidated?

[61] Mr Bishop disagreed with the assertion that Crown's matter was consolidated with the matters of Key and Executive by the order of C Orr J on 18 September 1997.

[62] Ms Davis is however insistent that they were. She submitted that the cases were consolidated because they were related companies, which shared common directors. The three companies, she said, are part of a group of companies which operated under the same directorship and all three companies were at the material time involved in the importation of motor vehicles, albeit each company dealt with differing makes of vehicles. The transactions with the Bank in all three suits, related to letters of credit opened by the three companies for the purchase of motor vehicles from Japanese and Korean suppliers.

[63] Mr Panton's evidence before the learned judge was that the sum of US$209,669.21 awarded to the Bank against Crown ought to have been deposited in a joint account in the joint names of the attorneys for the parties because the matter was consolidated. To that submission and Mr Panton's evidence, Campbell J, at page 4 of the judgment, made the following observations:

> "…Crown Motors was not joined in the trial of matters consolidated pursuant to the Order of 25th June 1998. The appeal in respect of the Order for Sale has only stated Crown Motors as appellant."

[64] At page 6, the learned judge stated:

> "…It is clear to me that the Order of Harrison J, was in respect of Crown Motors alone. It was also clear that it was the judgment that was delivered on 7th February 2005, in the consolidated matters, that Harrison J had ordered the sum awarded to Crown Motors on the 25th June 1998, to await the outcome of. That judgment is now shown not to be binding on Crown Motors, who was not a party to the suit. Crown Motors was never joined with the other matters for the trial. The claim that the Bank owes Crown Motors

> more than Crown Motors owes the Bank hinges on an assignment to Crown Motors of the judgment debt awarded to Key Motors. It was open to Crown Motors to join the bank in the consolidated matters, if their presence before the Court was deemed necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions between the parties…"

Analysis/Discussion

[65] It cannot be seriously argued that by order of C Orr J, the matter between the Bank and Crown, Suit No CL 1997/F-031 was not consolidated with the matters against Executive and Key, Suits No Cl F-030/1997 and Cl F-029/1997, respectively. C Orr J's order plainly stated:

> "1. This action is consolidated with Suits No. C.L. F 030/ 1997 and CL F 029/1997."

[66] The reason C Orr J considered the matters amenable to consolidation is readily apparent. Ms Davis' submission in that regard has found favour with this court. Crown, Key and Executive were engaged in similar business. All three companies were part of a group of companies, under the directorship of Mr Desmond Panton. The relationship between the Bank and all three companies was the same. The crux of the Bank's claim against Crown was similar to its claim against Executive and Key. To adopt Panton P's words in **Blue Cross of Jamaica v Veronica McGregor** [2010] JMCA Civ 30, at paragraph [11], "there is an inseparable relationship" between the suits. Panton P's following observation, at paragraph [11], of that case is applicable to the instant:

> "…The close relationship between the suits makes them ideal for consolidation. The parties are the same and the issues are virtually the same…"

[67] There can be no serious issue taken that all three matters were consolidated by virtue of C Orr J's order. Crown's matter however fell away from the trial of the consolidated claim, by virtue of Harrison J's default judgment granted against Crown in favour of the Bank. There however, remained a connection. The judgment sum of US$209,669.21 was not to be paid to the Bank. It was to be deposited into an interest bearing account to abide the outcome of the matters with the remaining contenders.

[68] The answer to the following question, clarifies any lingering doubt. Why was payment not ordered to be made directly to the Bank? The only logical answer, in the circumstances, has to be that the understanding among all the parties was that the matters were all viewed as consolidated, hence the Bank was not entitled to the judgment sum in light of the uncertainty as to the outcome of the other matters, that is whether the Bank would be found to be indebted to Executive and Key in a sum which exceeded the sum of US$209,669.21.

[69] The learned judge's observations that Crown was "not joined in the trial of the matters consolidated" and that Crown was the only appellant in respect of the appeal against the order for sale do not negate the fact that the matters were indeed consolidated. His observations no doubt resulted from the fact that it was only Crown that the judgment was obtained against, not Executive and Key. However the matters were consolidated because they were related and it was obviously intended by Harrison

J's order that the sum recovered against the Crown should be brought into consideration in the final outcome of the remainder of the consolidated case involving Executive and Key. Although in the circumstances it would have been convenient for the matters to have been tried together, they were not however so inextricably intertwined. The appeal only related to Crown, against which judgment was awarded.

[70] The issue of Crown's matter having fallen away by virtue of the default judgment, the matters involving Executive and Key had necessarily to be decided independently. The determination of those matters would decide whether the Bank was entitled to the judgment sum obtained against Crown. The judgment sum was therefore regarded by Harrison J as an amount to be held in abeyance until determination of the judgment of the consolidated matters and therefore was not available to the bank before the conclusion the matters against Key and Executive. The Bank was therefore not entitled to the use of the fruits of the judgment at that stage. Indeed the only logical construction of Harrison J's order was that the judgment sum was withheld because it was contemplated that depending on the outcome the other matters, the Bank might not have been entitled at all.

[71] In support of its application for a stay of proceedings, Crown also relied on the following as a basis for the granting of the application:

> "The Defendant Key Motors has assigned its judgment debt to the Defendant Crown Motors, so that more monies are currently due from the Claimant to Crown Motors than is due from Crown Motors to the [claimant]."

[72] Ms Davis submitted that Campbell J was apprised of the fact that McIntosh J was seized of the matter. Mr Panton had informed the court that the Bank's claims against Key and Executive, respectively, had then been determined and judgment was handed down on 7 February 2005. The Bank's claims against Key and Executive were dismissed, whilst Key and Executive obtained judgment against the Bank on their counterclaim in the sum of US$309,320.00 with interest at 33% per annum and in the sum of US$130,995.13 with interest at 33% per annum, respectively, with costs awarded to be agreed or taxed. The amount awarded to Key and Executive was therefore more than that awarded to the Bank in its claim against Crown. Key had assigned its judgment debt to Crown on 10 February 2005 and therefore it was available to off-set the sum due from Crown to the Bank.

[73] Mr Bishop deposed however that the purported assignment of the judgment was merely a further "ploy by/of Crown to deprive the bank of the fruits of its judgment". He noted that although the parties were before the court and the court was seized of the matter, the assignment was made without an order from the court. It was clear, he said, that Crown has failed to do what is right and fair by its failure to obey the court's orders.

Analysis

[74] Was the assignment merely a ploy to prevent the Bank from reaping the fruits of its judgment? Another question which arises, is whether, in order to be effective, it was necessary for the deed of assignment to have been done at the instance of the court? Was it necessary to have the court's blessing?

[75] The assignment of the debt serves to bolster Crown's claim. C Orr J recognized that the three companies were connected. Had Key not assigned its judgment to Crown, it could have been asserted that by C Orr J's order, Key and Executive were not obliged to make any judgment in their favour available to Crown.

[76] On 21 January 2005, there was a repurchase agreement made with Dehring, Bunting & Golding Limited by Ms Carol Davis in trust for Executive Motors Limited for the sum of US$335,000.00, which was money available to satisfy the judgment debt according to the affidavit of Ms Carol Davis, sworn to on 21 January 2005 and filed in support of the application for a stay of proceedings. Given the above, the question is whether it was just to have refused the appellants' application for stay. In the circumstances grounds (i) and (iv) succeed.

[77] It is convenient to consider grounds (ii) and (iii) together.

Ground (ii) -"The Learned Judge in Chambers erred in refusing the [sic] grant an Order that the monies held in account 02MOB811294 at Dehring, Bunting & Golding Limited be transferred into the joint names of the Attorneys-at-law for the [Bank] and the [appellants] herein or in the alternative be transferred into an account in the joint names of the Attorneys-at-law for the [Bank] and the [appellants] at the Bank of Nova Scotia Jamaica Limited, Commercial Banking Center, until further Order of this Honourable Court."

Ground (iii) – "That the Learned Judge in Chambers erred in that there was no need to proceed with the Sale of the premises, because the Order for Sale had been granted to enforce the judgment of the Honourable Mr. Justice Karl Harrison made on 25th June, 1998, and all the monies required to satisfy the said judgment were available to be paid into a joint account in the names of

the Attorneys-at-law for the parties in accordance with the said Order of the Honourable Mr. Justice Karl Harrison."

[78] In respect of ground (ii), having regard to the determination of this court on the issues and circumstances in relation to the other grounds, I am of the view that the learned judge erred in refusing to allow the sum which was deposited to the above mentioned account to be transferred into an account in the joint names of the attorneys representing the parties. In light of the foregoing, ground (iii) must also succeed.

[79] I cannot leave this matter without commenting on the court's observation that both Ms Davis (counsel for the appellants) and Mr Bishop (counsel for the Bank) provided affidavit evidence in the matter whilst appearing as counsel in the matter. This is wholly unacceptable. It is not only irregular (see **R v Secretary of State for India in Council and Others *Ex parte* Ezekiel** [1941] 2 All ER 546), but also contravenes Cannon V rule (p) of the Legal Profession (Cannons of Professional Ethics) Rules which states:

> "While appearing on behalf of his client, an Attorney shall avoid testifying on behalf of his client, except as to merely formal matters, or when essential to the ends of justice, and if his testimony is material to the cause he shall, wherever possible, leave the conduct of the case to another Attorney."

[80] In the circumstances, I would therefore allow the appeal and make the following orders:

i. Campbell J's order made on 10 March 2005 is set aside.

ii There be a stay of proceedings/execution of the judgment with respect to the order for sale of premises at 8 Marescaux Road, Kingston 5 made by Campbell J on 2 April 2004 until the determination of the appeal filed on 18 March 2005 by First Trade International Bank & Trust Limited (in liquidation) against the decision of McIntosh J on 7 February 2005 (SCCA No 33/2005).

iii. That the monies currently held in account at Dehring Bunting & Golding Limited be transferred into the joint names of the attorneys-at-law for the Bank and the appellants or in the alternative be transferred into an account in the joint names of the attorneys-at-law for the Bank and the appellants at the Bank of Nova Scotia Jamaica Limited, Commercial Banking Center, within 14 days of the date of this order, until otherwise ordered.

iv. Costs to the appellants to be agreed or taxed.

MORRISON JA

ORDER

i. Appeal allowed.

ii Campbell J's order made on 10 March 2005 is set aside.

iii. It is ordered that there be a stay of proceedings/execution of the judgment with respect to the order for sale of premises at 8 Marescaux Road, Kingston 5 made by Campbell J on 2 April 2004 until the determination of the appeal filed on 18 March 2005 by First Trade International Bank & Trust Limited (in liquidation) against the decision of McIntosh J on 7 February 2005 (SCCA No 33/2005).

iii. It is ordered that the monies currently held in account at Dehring Bunting & Golding Limited be transferred into the joint names of the attorneys-at-law for the Bank and the appellants or in the alternative be transferred into an account in the joint names of the attorneys-at-law for the Bank and the appellants at the Bank of Nova Scotia Jamaica Limited, Commercial Banking Center, within 14 days of the date of this order, until otherwise ordered.

iv. Costs to the appellants to be agreed or taxed.