

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2020CV00074

APPLICATION NO COA2020APP00230

BETWEEN	KEY MOTORS LIMITED	APPLICANT
AND	HYUNDAI MOTOR COMPANY	RESPONDENT

Ransford Braham QC and Abraham Dabdoub instructed by Dabdoub, Dabdoub and Co for the applicant

Ms Amanda Montague instructed by Myers Fletcher and Gordon for the respondent

12 and 19 January 2021

IN CHAMBERS

BROOKS P

[1] In this application Key Motors Limited (Key) seeks an order for the stay of execution of two judgments of Laing J, which were handed down on 23 September 2020 (the first judgment) and 2 November 2020 (the second judgment). The effect of those judgments is that Hyundai Motor Company (HMC) is entitled to enforce a debt arising from an award resulting from an arbitration conducted in Korea between Key and HMC. The stay is sought to prevent that enforcement pending the determination of Key's appeal against those judgments.

[2] Key asserts that it has a meritorious appeal but that if the judgments are executed in the meantime, it would be oppressive in two respects:

- a. the award is for a significant amount of money (approximately \$80,000,000.00, and execution would ruin Key's business; and
- b. if the monies were paid to HMC, there would be significant difficulty in seeking to recover the proceeds of execution from HMC, which is based in Korea.

[3] HMC contends that there is no contesting Key's liability under the award as Key did not appeal it, and that Key's present appeal, being based on meritless procedural grounds, should not be allowed to prevent execution of the judgment that is based on the award. Delay, HMC argues, will only worsen its ability to collect what is due from Key.

[4] It is Key that initiated the arbitral proceedings in Korea. It was ordered to pay the costs of the arbitration and HMC's legal fees. HMC, through its agent in Jamaica, filed a fixed date claim form under the Arbitration (Recognition and Enforcement of Foreign Awards) Act, 2001 (AREFA) and the Arbitration Act 2017, to enforce the collection of the amount due under the award. Key advanced a number of points in opposition to HMC's claim.

[5] Laing J ruled against Key and it seeks to have this court set aside his orders. In the meantime, however, HMC commissioned the court's bailiff to execute the judgment. The bailiff commenced the process by marking, for levy, certain vehicles belonging to Key. The value of the vehicles is said to be approximately \$20,000,000.00.

[6] On 21 December 2020, the application for stay came on for hearing, without notice to HMC, before a single judge. An interim stay was granted pending the outcome of the hearing of the application, on notice to HMC.

[7] In this hearing, Mr Ransford Braham QC, on behalf of Key, strenuously contended that the issues raised by Key are arguable and meritorious. He submitted that:

- a. the affidavits in support of the fixed date claim were not sworn by someone who had first-hand knowledge of their contents and as such contained hearsay evidence;
- b. the affidavits were not only invalid, as they were contrary to rule 30.3 of the Civil Procedure Rules (CPR), but in the absence of a valid supporting affidavit, the claim was incapable of succeeding;
- c. the affidavit that was later filed to shore-up the claim was not executed in accordance with the requirements of section 22(4) of the Judicature (Supreme Court) Act, and although Laing J recognised

the defect and, in his first judgment, gave HMC time to correct it, the attempt to correct was flawed;

- d. HMC, therefore, was not in compliance with the requirement of Laing J's first judgment as it relates to verification of the authority of the person who administered the oath; and
- e. the interaction between the Arbitration Act and the AREFA results in at least two conflicts in the relevant legislation, resulting in the claim being flawed, because:
 - i. of the absence of a certified, or duly authenticated copy of the arbitral award; and
 - ii. it seeks to achieve the impermissible, which is to recover costs only.

[8] Ms Amanda Montague, on behalf of HMC, was equally strong in seeking to refute Key's arguments. She indicated, in part, that:

- a. the documents that were exhibited to the affidavits in support of the fixed date claim, had previously been communicated to Key, were business documents and not subject to the hearsay rule;

- b. one of the deponents was an employee of HMC and was therefore qualified to produce the documents on HMC's behalf;
- c. the certification of the Notary Public was in accordance with the Judicature (Supreme Court) Act and the learned judge so declared it;
- d. there is no conflict between the Arbitration Act and the AREFA, the Arbitration Act unequivocally amended the AREFA to allow for enforcement proceedings under the Arbitration Act, which embodies the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, which deal with any conflicts;
- e. the arbitration dealt with the issue of costs as a substantive part of the deliberations and the Arbitration Act recognises that costs are a part of any arbitral award; and
- f. there has been no appeal from the arbitration award, which in any event, is enshrined by the law with some amount of sanctity.

Ms Montague asserted that granting Key time will only exacerbate its claimed dire financial situation and cause HMC greater loss.

[9] The law on the issue of the grant or refusal of applications pending the outcome of an appeal, is now well settled:

1. the judgment creditor is entitled to the fruits of its judgment;
2. the court will however stay execution of the judgment if;
 - (a) the judgment debtor has an arguable appeal with some prospect of success;
and
 - (b) the justice of the case requires that a stay be granted; and
3. the test as to the justice of the case includes asking whether any of the parties would be likely to suffer irreparable harm depending on if the stay is granted, or alternatively, if the stay is refused.

Included in the considerations of the test as to the justice of the case, are questions such as, whether the appeal would be stifled if the stay is not granted, and whether a successful appeal would be rendered nugatory by a refusal of a stay.

[10] The leading cases on the point are **Hammond Suddard Solicitors v Argichem International Holdings Ltd** [2001] EWCA Civ 2065 and **Combi (Singapore) Pte Ltd v Ramnath Sriram and Another** [1997] EWCA 2164. A comprehensive review of the relevant principles was conducted in this court by

Lawrence-Beswick JA (Ag) in **Caribbean Cement Company Ltd v Freight Management Limited** [2013] JMCA App 29. Although there was an application to vary her decision the challenge was not in respect of the issue of the stay of execution (see [2015] JMCA App 1).

[11] The relevant circumstances in the present case are:

- (1) HMC has a judgment in its favour;
- (2) there is no doubt that Key owes the monies to HMC;
- (3) the bailiff has already marked goods for the purposes of executing the writ of seizure and sale;
- (4) Key asserts that execution of the judgment would put it out of business as the debt exceeds its annual income;
- (5) Key's objections are all procedural;
- (6) whereas it is appropriate that the correct procedure is followed, the substance of the claim cannot be ignored; and
- (7) if the stay is refused, and monies are paid to HMC, the prospect of Key being entitled to recover those monies would, be attended by great difficulty and expense.

[12] As solid as HMC's position seems to be, it is without doubt that the refusal of the stay would create more irretrievable hardship to Key, than a granting of the stay would

cause to HMC. The first issue to be resolved, of course, is whether Key has an arguable appeal. There are issues involved in the procedure used by HMC which should be subjected to testing by the court on appeal. There are some assertions by counsel for HMC which require closer analysis by the court. These include:

- a. whether the affidavits were made by persons who could speak of their own knowledge to the arbitration agreement between Key and HMC and of the arbitration award; and
- b. whether the qualification of the Notary Public who witnessed the second affidavit was proved in accordance with the Judicature (Supreme Court) Act.

[13] Similarly, the issues surrounding the interaction between the Arbitration Act and the AREFA do merit analysis by this court, as the Arbitration Act is relatively new. A matter of concern, if not alarm, is Mr Braham's submission that, on Key's assertion of the interaction between the AREFA and the Arbitration Act, an award of costs of an arbitration could not, by itself, be recovered in this country by the successful party to the arbitration.

[14] Those issues affect the foundation of the learned judge's decision and therefore if Key is successful on those points, the orders at first instance may be set aside.

[15] It is noted, however, that Key's financial situation, as outlined by the affidavit of Mr Desmond Panton in support of the application for the stay of execution, has not been supported by any documentation. This is unacceptable. A similar deficiency was castigated in **Hammond Suddard**, where, in delivering the judgment of the court of appeal of England and Wales, Clarke LJ said, at paragraph 20:

"Before it could properly grant a stay, the court needs to have a full understanding of the true state of the company's affairs. Simple assertion, particularly if it is scarcely consistent with previous assertions, is not enough. Thus in the instant case, we would have expected the appellant to produce accounts showing precisely what its trading and financial position is and how it has changed...in order to evaluate the risks of allowing enforcement to proceed in the ordinary way."

[16] Some protection should, therefore be given to HMC for the award in its favour. Of concern, is the fact that the vehicles that have been seized will only deteriorate if their present situation continues for a period of months. Appeals are currently being set for September and October 2021 at the earliest.

[17] A middle ground would be to allow the bailiff to complete the execution of the order for seizure and sale, and for the proceeds of sale to be placed on deposit pending the outcome of the appeal. A further sum of \$20,000,000.00 should also be paid as a condition of granting the stay of execution.

[18] The orders, therefore, are:

1. Further execution of the judgments of Laing J
handed down on 23 September 2020 and 2

November 2020 is stayed pending the outcome of the appeal, on condition that Key Motors Limited pays, on or before 1 February 2021, the sum of \$20,000,000.00 into an interest bearing account in the joint names of the attorneys-at-law for both parties and failing such a deposit, pay the sum into court, by that date.

2. The Bailiff of the Supreme Court is nonetheless empowered to complete the sale of the goods that she has marked as part of the execution against Key Motors Limited of the order for seizure and sale in her possession.
3. The net proceeds of sale shall be paid to the respondent's attorneys-at-law, who shall promptly place it on an interest bearing account in the joint names of the attorneys-at-law for both parties and failing such a deposit, promptly pay the sum into court.
4. Liberty to apply.
5. Costs of this application to be costs in the appeal.